Supreme Court, U.S.
FILED

941216 JAN 13 1995

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1994

J. CHARLES F. GILLE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

J. Charles F. Gille, *pro se*
1700 W. Quantico Street
Broken Arrow, Oklahoma 74011
Tel. 918-455-5968

January 13, 1995

QUESTIONS PRESENTED

1. Does the "last known address" provision of the notice of deficiency statute give the IRS license to ignore any knowledge it has of a person's actual address and instead mail the notice to an address it knows to be insufficient?

2. When an action against the United States is based on claims of numerous procedural due process violations, and the trial court's finding of liability addresses and is based on only one of those claimed violations, does the circuit court's reversal of the finding of liability, rather than remanding for further findings on the remaining issues, so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

SUMMARY OF REASONS FOR ALLOWING WRIT 13

REASONS FOR ALLOWING THE WRIT 13

1. The term "last known address," not defined in the Internal Revenue Code, and not settled by this Court, just evolved into a vehicle for denial of due process, requiring intervention by this Court. 13

2. The holding that the IRS is entitled to ignore clear evidence that a taxpayer has moved, conflicts with other circuits. 19

3. The implied holding that the IRS may intentionally deny access to Tax Court conflicts with the intent of Congress and applicable decisions of this Court. 21

4. Reversal of the district court's finding of liability, rather than remanding for findings of fact and

Page

conclusions of law on the other grounds, so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. 22

CONCLUSION 26

JUDGMENT TO BE REVIEWED . . . . Appendix A.1

DISTRICT COURT JUDGMENT . . . . . Appendix B.1

DISTRICT COURT CLARIFICATION . . . . . Appendix C.1

MANDATED JUDGMENT . . . . . Appendix D.1

REHEARING DENIED . . . . . Appendix E.1

Amendment V, U.S. Constitution . . . . . Appendix F.1

Sections of Internal Revenue Code of 1986 (26 U.S.C.) . . . . . Appendix G.1

Plaintiff's Issues In Agreed Pretrial Order Appendix H.1

Chart: Chain of Authorization . . . . . Appendix I.1

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Creighton, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) 23

Armstrong v. Commissioner, 15 F.3d 970 (10th Cir. 1994) 14, 15, 20

Berger v. C.I.R., 404 F.2d 668 (3rd Cir.1968) 19

Cyclone Drilling, Inc. v. Kelley, 769 F.2d 662 (10th Cir.1985) 15, 16

Dean Milk Co. v. Madison, 340 U.S. 349, 95 L.Ed. 329 (1951) 23

Epstein v. Goldstein, 110 F.2d 747 (2d Cir. 1940) . . . 23

Fuentes v. Shevin, 407 U.S. 67, 32 L.Ed.2d 556, 92 S.Ct. 1983 (1972) 22

Gille v. United States, 33 F.3d 46 (10th Cir. 1994) 14-16

In Re Linda Coal, 255 F.2d 653 (3rd Cir.1958) 23

Laing v. United States, 423 U.S. 161, 46 L.Ed.2d 416, 96 S.Ct. 473 (1976) 21

Marks v. C.I.R., 947 F.2d 983 (D.C. Cir. 1991) 21

McPartlin v. C.I.R., 653 F.2d 1185 (7th Cir.1981) . . . 20

Mulder v. C.I.R., 855 F.2d 208 (5th Cir.1988) 20

Powell v. C.I.R., 958 F.2d 53 (4th Cir.1992), *cert. den.* 113 S.Ct. 440, 121 L.Ed.2d 359 (1992) 19

Rorex v. Traynor, 771 F.2d 383 (8th Cir.1985) 20

Sherwin v. Welch, 319 F.2d 729 (D.C. Cir. 1963) 23, 25

United States v. Beach, 324 U.S. 193, 89 L.Ed. 865 (1945) 23

United States v. Zolla, 724 F.2d 808 (9th Cir.1984), *cert. den.* 469 U.S. 830, 105 S.Ct. 116, 83 L.Ed.2d 59 (1984) 20

Wallin v. C.I.R., 744 F.2d 674 (9th Cir.1984) 20

Weinroth v. Commissioner, 74 T.C. 430 (1980) . . 15, 16

STATUTES AND OTHER AUTHORITIES

26 C.F.R. § 6203-1 6

26 U.S.C. § 6103 . . . . . 4, 7, 9, 12, Appendix G.1

26 U.S.C. § 6212(b) . . . . . 16, 24, Appendix G.3

26 U.S.C. § 6213 . . . . . 7, 18, Appendix G.4

26 U.S.C. § 6303(a) . . . . . 24, Appendix G.5

26 U.S.C. § 6321 . . . . . Appendix G.5

26 U.S.C. § 6323 . . . . . Appendix G.5

26 U.S.C. § 6331(d)(2)(c) . . . . . 11, 24, Appendix G.7

26 U.S.C. § 7431 . . . . . 3, 7, Appendix G.8

26 U.S.C. § 7433 . . . . . 12, Appendix G.9

28 U.S.C. §§ 1331 and 1346 3

Fed.R.Civ.P. 52(a) 23, 25, 26

No. _____

In the

Supreme Court of the United States of America

October Term, 1994

J. CHARLES F. GILLE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

Petitioner, J. Charles F. Gille, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit reversing a finding of liability against the United States for unauthorized disclosure of return information, holding that the IRS is entitled to ignore its knowledge of the actual address and send the notice of deficiency to an address it knows to be insufficient, and reversing rather than remanding for resolution of other issues not decided by the trial court and not before the appellate court.

OPINIONS BELOW

The opinion of the Court of Appeals is reported as *Gille v. United States*, 33 F.3d 46 (10th Cir. 1994), and appears in Appendix A to this Petition. The opinion of the District Court for the Northern District of Oklahoma, including the Order clarifying the decision, is reported as *Gille v. United States*, 838 F.Supp. 521 (N.D. Okla. 1993), and appears in Appendices B and C. The order of the District Court pursuant to the mandate from the Court of Appeals appears in Appendix D.

JURISDICTION

The Court of Appeals' Opinion in this matter was filed on August 17, 1994. A timely Petition for Rehearing was filed on September 29, 1994. The Court of Appeals' denial of the Petition for Rehearing was issued on October 24, 1994, and is set forth in Appendix E. This Court's jurisdiction is invoked under Title 28, U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V to the United States Constitution is set forth in Appendix F.

The pertinent sections of the Internal Revenue Code, 26 U.S.C. §§ 6103, 6212, 6213, 6303, 6321, 6323, 6331, 7431, and 7433, are set out in Appendix G.

STATEMENT OF THE CASE

[NOTE: This Statement is longer than would be necessary to set forth the facts material to the question of the last known address, but the length is necessary to contain the facts material to the question of whether there were numerous issues left unresolved by the Court of Appeals, for which the case should have been remanded rather than reversed.]

On May 29, 1990, Petitioner J. Charles F. Gille filed in the United States District Court, Northern District of Oklahoma, an action against the United States under Title 26, U.S.C. § 7431, for ten unauthorized disclosures of return information, in the form of notices of lien and notices of levy. The court had jurisdiction pursuant to Title 26, U.S.C. § 7431, and Title 28, U.S.C. §§ 1331 and 1346.

On July 26, 1990, the Government filed its Answer, admitting jurisdiction, but denying that the disclosures of return information were unauthorized.

On September 27, 1990, Gille filed an Amended Complaint, asserting that the notices were unauthorized since the procedural requirements for issuing them had not been met. For instance, the Internal Revenue Service

("IRS") had knowingly sent the notice of deficiency, notice of assessment, and notice of intent to levy ("Final Notice"), to the wrong address, and had failed to comply with other requirements of the assessment procedure.

On October 22, 1990, the Government filed a Motion to Dismiss, asserting that the collection notices were authorized under the statute and regulation authorizing disclosures for investigative purposes, that notices of lien and levy are authorized by the statutes which authorize them (without regard to the requirements stated therein), and that the disclosures were made in good faith. On November 13, 1990, Gille filed a Response arguing that collection notices are authorized only when due-process requirements have been met, and are not otherwise authorized as investigative disclosures, that the "dummy" return was insufficient to invoke assessment authority, that neither the notice of deficiency nor the notice of assessment nor the final notice was sent to the last known address, and that the assessment document was defective. On March 13, 1991, the Court denied the Motion to Dismiss, stating "Plaintiff has unquestionably stated a viable legal claim pursuant to 26 U.S.C. § 6103."

On August 5, 1991, with leave of the Court, Gille filed his First Supplement to Amended Complaint, adding eight more disclosures.

On November 12, 1991, Gille filed a Motion for Partial Summary Judgment Regarding Sufficiency of Notice, moving to have the notices of lien and levy declared procedurally invalid since they were made prior to the existence of a lien, as Gille had received no notice or demand to pay, and therefore had neither neglected nor refused to pay, as required before a lien can arise, and

that the IRS had knowingly mailed the notice of deficiency, a notice of assessment, and the final notice to an address from which it knew Gille had moved and for which the forwarding order had expired, merely going through the motions of compliance with the statute but knowing it would be of no effect.

Also on November 12, 1991, Gille filed a Motion for Partial Summary Judgment Regarding Invalidity of Assessment, moving to have the assessment declared procedurally invalid, as there was no valid return to invoke the authority to assess, there was no notice of deficiency or notice of assessment, and the assessment had not been recorded in the required manner.

On November 13, 1991, the Government moved for Summary Judgment, asserting 1) that an assessment may not be challenged except in Tax Court or in a refund suit, 2) that "the United States enjoys a presumption of procedural regularity," 3) that the collection notices were authorized under the statute and regulation authorizing disclosures for investigative purposes, 4) that the notices of lien and levy are authorized by the statutes which authorize them, 5) that where Congress says the IRS "shall" make a return, it means the IRS "may" do so, 6) that the Tenth Circuit does not require the IRS to use reasonable diligence to ascertain the correct address when it is aware that a taxpayer has moved, and 7) that the disclosures were made in good faith.

On November 25, the Government filed a Response to Gille's Motion for Partial Summary Judgment Regarding Procedural Invalidity of Assessment, asserting that the procedural validity of an assessment cannot be challenged in a wrongful disclosure suit, that a valid return need not

be filed before an assessment, that due diligence required no more than checking to see whether a more recent return had been filed with a new address, that the challenges to the assessment procedure did not have merit, and that a document created in response to a discovery request in this action satisfied the requirement of legislative regulation 26 C.F.R. § 6203-1 for supporting records.

On November 25, 1991, Gille filed a Response to the Government's Motion for Summary Judgment, showing that the Government had admitted that the requirements of the regulation had not been met, and that the Government failed to use reasonable diligence in regard to the last known address, and arguing 1) that collection notices are authorized only when due-process requirements have been met, and are not otherwise authorized as investigative disclosures, 2) that the procedural validity of a federal tax lien may indeed be challenged by a suit for unauthorized disclosure, providing examples, 3) that the "dummy" return did not satisfy the statutory requirements, 4) that actual notice of some kind is required before collection activity is authorized, 5) that the presumption of regularity of the Form 4340 prepared for litigation had been overcome, and 6) that the good-faith argument had been disproved.

On April 14, 1992, the District Court denied both of Gille's motions for partial summary judgment, stating "Sovereign immunity, unless waived, does not permit a collateral attack in the merits of a tax assessment," and denying the Government's motion for summary judgment, "because material issues of fact remain to be litigated."

On April 22, 1992, the Government filed a motion for

reconsideration, arguing that all disclosures "were made in the process of attempting to collect plaintiff's tax liability for 1983 and therefore were authorized" under the statute allowing investigative disclosures, conceding that perhaps the procedural validity of the assessment could be challenged in this suit, but arguing that the notices were mailed to the "last known address, that is, the address on taxpayer's most recent tax return," and that all disclosures were made in good faith.

On May 18, 1992, Gille filed a motion for reconsideration, arguing 1) that his procedural challenges did not attack the merits of the tax assessment, and they lay within the scope of the specific waiver of sovereign immunity found in § 7431 as well as the waiver found in § 6213(a), 2) that the Government had filed no response to the Motion for Summary Judgment Regarding Sufficiency of Notice, so the 40 numbered facts therein, which were supported by affidavit with exhibits and established willful disregard by the IRS for the requirements of procedural due process, remained uncontested, and therefore Gille was entitled to summary judgment on those issues as a matter of law, and 3) that the "good faith" defense was available only where an *erroneous interpretation* of § 6103 is specifically pleaded, which the Government had not done.

On July 17, 1992, the District Court entered an Order denying the motions of both parties for reconsideration.

On October 21, 1992, the parties filed an Agreed Pretrial Order, in which Gille contended 1) that officers of the United States knowingly disclosed Gille's 1983 return information, 2) that the disclosures were unauthorized since collection was not authorized, 3) that collection was

not authorized since no lien had arisen, 4) that no lien had arisen since Gille had not been given notice and demand to pay, nor had he neglected or refused to pay, 5) that Gille was not able to neglect or refuse to pay since the IRS had knowingly denied him notice of assessment and demand to pay, 6) that the notices of levy were further unauthorized since the IRS had knowingly denied Gille notice of intent to levy, 7) that the denials were effected by sending the notices to an address from which the IRS knew the Gilles had moved because previous letters to that address had been returned to the IRS undeliverable, 8) that the IRS wrongfully construed the term "last known address" to justify intentional ignorance of the new address, i.e. denial of notice, 9) that the IRS used the address from the Gilles' 1982 joint return as the "last known address", 10) that Gille's only contact or relation with the bank to which the IRS disclosed his return information was that Mrs. Gille opened an account there after the Gilles moved to Oklahoma, 11) that the IRS had Gille's address prior to issuing the notice of deficiency, 12) that the IRS had been notified of Gille's correct address in the process of resolving the Gilles' joint return for 1982, which was the return used for the "last known address," 13) that the IRS also knew of the Gille's address from Mrs. Gille's tax returns for 1985, 1986, and 1987, 14) that the first two disclosures were to Mrs. Gille's employer and bank, obtained from a computer search which revealed the Gilles' correct address, 15) that the notice of lien contained an admitted false statement, and the IRS is not authorized to issue false statements, 16) that the certifying signature on each of the three postal tracers, required by regulation, was fraudulent, 17) that the Government's failure to answer the amended complaint constituted

admission of the allegations therein, 18) that the Government's failure to respond to Gille's motion for partial summary judgment regarding sufficiency of notice entitled Gille to judgment thereon as a matter of law, 19) that the assessment document did not contain the required identifying information, 20) that the document claimed to be the supporting document required for an assessment was inadequate for that purpose as it was prepared in response to Gille's discovery request, 21) that the good-faith defense was unavailable since no erroneous interpretation of § 6103 was claimed, and 22) that the subsection of § 6103 authorizing disclosures for investigative purposes did not authorize otherwise-unauthorized collection notices, nor any disclosure to obtain information already in the possession of—and readily available to—the IRS.

The IRS contended 1) that any disclosures were authorized by the section authorizing investigative disclosures, and 2) that if there were any unauthorized disclosures, they were made in good faith.

The Government stipulated to 33 facts, including that the IRS was aware when each notice mailed to the Utah address was returned undeliverable, including notices returned prior to issuance of the notice of deficiency.

Gille proposed 5 issues of fact and 26 issues of law (*See* Appendix H, "Plaintiff's Issues in Agreed Pretrial Order"), and the Government proposed 2 issues of fact: 1) whether the disclosures contained more information than necessary for the liens and levies to serve their purpose, and 2) whether the disclosures were made in good faith. In an addendum, the Government proposed three issues of law: 1) whether any disclosures were authorized as investigative

disclosures, 2) whether any unauthorized disclosures were made in good faith, and 3) whether a taxpayer's "last known address" means the last address of which the taxpayer himself informed the Internal Revenue Service.

On November 27 and 30, 1992, the parties filed their trial briefs and proposed findings of fact and conclusions of law. Gille challenged the sufficiency of each of the notices sent to the Utah address after the IRS became aware that the Gilles had moved. Gille also challenged the IRS claim that disclosures were necessary to ascertain the new address, arguing that the IRS had already used his Oklahoma address to resolve a deficiency on the very return used for the "last known address", but then ignored the Oklahoma address on the very transcript used to make the first two disclosures. He argued that the disclosures were not made in good faith, showing how the authority used by the Government actually denied the Government's position.

On May 1, 1992, the matter was heard by the Court without a jury. Gille's orally renewed motion for a directed verdict for failure to answer the Amended Complaint, and his unopposed Motion for Partial Summary Judgment Regarding Sufficiency of Notice, were denied. Using an overhead projector, Gille graphically depicted the relevant statutory procedural steps as links in a chain of authorization. *See* Chain of Authorization, Appendix I. Gille suggested that if any link was not intact, nothing below it was authorized. Gille's 47 exhibits were accepted into evidence.

At trial, the IRS agent showed the contradiction in the Government position when he testified 1) that the IRS considered both Mr. and Mrs. Gille to be "the taxpayer"

for purposes of investigating the 1983 tax year,[1] since the previous return was a joint return, and 2) that the IRS did *not* consider both Gilles to be "the taxpayer" of the joint return when the IRS was notified of the Gilles' Oklahoma address while resolving that very return. The agent then revealed a new violation by the IRS when he testified that the notices of levy to Mrs. Gille's employer and bank were merely for the purpose of confirming that "Vicki Rebeck" was Mrs. Gille, a violation of § 6331(f) of the I.R. Code. Any such intent, however, was shown to be excessive by the Government's own Exhibit #7, the "most recent return" used for the "last known address," the Gilles' 1982 joint return on which Mrs. Gille legibly signed her name "Vicki Lynn Rebeck Gille".

On July 19, 1993, the United States District Court for the Northern District of Oklahoma ruled that the notices were not sent to Gille's "last known address." The court held that the IRS knew or should have known that Gille had moved, but failed to exercise reasonable diligence in ascertaining the new address. The United States was therefore found liable to Gille for thirteen unauthorized disclosures, at $1,000 each. On August 18, 1993, Gille filed a motion to clarify the judgment. On August 25, 1993, the Government filed a memorandum in opposition. On August 31, 1993, the court found the United States liable for three more disclosures.

On September 21, 1993, the Government filed a notice of appeal.

---

[1]The agent first testified that he was assigned to investigate only Mr. Gille and not Mrs. Gille. However, when shown a copy of his action log, he admitted that he was assigned to investigate both.

On January 26, 1994, the Government filed its appeal brief, arguing that even if the assessment was invalid, all disclosures were in connection with official duties incident to collection procedures, which may not be challenged in a suit for unauthorized disclosure, regardless of the validity of the liens or levies, that all disclosures were authorized as investigative disclosures, that the IRS was entitled to ignore its knowledge of Gille's move, that Gille had failed to establish bad faith, and that 26 U.S.C. § 7433 was the exclusive remedy for most of the disclosures.

On March 29, 1994, Gille filed his answer brief, arguing that § 7433 was inapplicable to this case, that § 6103 does not waive procedural requirements for collection activities or make illegal collection actions legal, that actual notice is required prior to deprivation of property, that the IRS was aware that the Gilles had moved and could not reasonably have believed Gille wished the notices sent there, that no disclosures met the requirements of authorized investigative disclosures, that the "good faith" defense was unavailable, and that the evidence refuted any claim of good faith.

On August 17, 1994, the Court of Appeals reversed the trial court. The appellate court held that the notice of deficiency had been sent to Gille's "last known address," since the IRS was entitled to rely solely upon documents from Gille and to disregard other sources, such as Mrs. Gille and the United States Postal Service. Rather than remand for findings on the sufficiency of the subsequent notices, and resolution of the remaining issues, the court of appeals reversed the finding of liability.

SUMMARY OF REASONS FOR ALLOWING WRIT

The decision for which review is petitioned resolves an ambiguity in the Internal Revenue Code, which has not been settled by this Court, in a manner which conflicts with the right to due process as protected by the Fifth Amendment. Through a new way of interpreting the term "last known address" in the Code, the court of appeals has created a new loophole through which the IRS has intentionally denied—and can and will in the future deny—a taxpayer access to Tax Court. The decision proclaims that the IRS is entitled to intentionally mail all notices to an old address, ignoring a new address of which it is aware, and ignoring the fact that the postal service returns each notice undeliverable. This allows the IRS to violate the Fifth Amendment by intentionally denying a citizen notice and opportunity to be heard before it takes his property.

Also, under the circumstances of this case, complete reversal based upon this one issue, rather than remanding for further findings of fact and conclusions of law on the numerous other issues before the Court, violates basic principles of judicial review and the rules of civil appellate procedure.

REASONS FOR ALLOWING THE WRIT

1. The term "last known address," not defined in the Internal Revenue Code, and not

settled by this Court, just evolved into a vehicle for denial of due process, requiring intervention by this Court.

The Court of Appeals held that the IRS is entitled to proceed with collection activities against a citizen when it has intentionally ignored unmistakable evidence that a taxpayer has moved, and intentionally ignored its own knowledge of the correct address, *unless* the knowledge of the new address came from the taxpayer himself, either in a tax return or in a specific notice of change of address. This was in a context where the taxpayer knew that the IRS was fully aware of his correct address, and therefore assumed that no further notice to the IRS was necessary.[2]

The Court of Appeals decision created a new rule:

> Unless the taxpayer can prove that he or she has provided clear and concise notice of a new address, the IRS is entitled to rely on the address used on the return for the tax year in question, or, as in this case, from the taxpayer's most recent tax return.

Gille v. United States, 33 F.3d 46, 47 (10th Cir. 1994), citing *Armstrong v. Commissioner*, 15 F.3d 970, 973-74 (10th Cir.1994). Lest there be any misunderstanding about what the Court meant by "Unless the taxpayer can

[2]His "most recent return," from which his "last known address" was taken, was filed jointly with his wife. The couple notified the post office when they moved, the post office forwarded a notice of deficiency, the wife paid the deficiency through an attorney before her husband could contest the amount, the husband demanded that his wife get a receipt for the payment, she did so using their home address, and the IRS changed its address for her but not for him. The couple assumed that the IRS had changed the address for them both, since they both were the taxpayer for the joint return.

prove that *he* or *she* has provided" the notice to the IRS, the Court emphasized the requirement that it be the taxpayer him*self* or her*self* who provides the notice:

> [T]he IRS is entitled to rely on those documents which are submitted by the taxpayer, *Armstrong*, 15 F.3d at 974.

Gille. 33 F.3d at 48.

The problem arose because the term "last known address" is not defined in the Internal Revenue Code, nor has its meaning been addressed or settled by this Court. As admitted by the Tenth Circuit, the term has come to be considered by the courts to mean "that address to which the IRS reasonably believes the taxpayer wishes the notice sent." *Gille*, 33 F.3d at 47, quoting *Armstrong*, 15 F.3d at 973, quoting *Cyclone Drilling, Inc. v. Kelley*, 769 F.2d 662, 664 (10th Cir.1985). [The list of authorities in accord are legion.]

The new rule proclaimed by the Court of Appeals relies upon wording from previous opinions. The predominant authority in the Tenth Circuit on this issue has long been the *Cyclone Drilling* decision. Regarding the taxpayer's burden to provide notice of his current address to the IRS, the *Cyclone Drilling* opinion relied upon a Tax Court decision:

> In recognition of obvious nation-wide administrative realities, the burden is on the taxpayer to provide "clear and concise" notice of his current address to the IRS; the IRS is otherwise entitled to rely on the address shown on the taxpayer's tax return for the year in question. *Weinroth v. Commissioner*, 74 T.C. 430, 435 (1980).

Cyclone Drilling, 769 F.2d at 664.

The new interpretation drawn by the Court of Appeals, while interpreting strictly the wording above, actually contradicts the line of authority upon which it relies. The *Weinroth* court stated that the last known address is "the address to which, *in light of all the surrounding facts and circumstances*, the respondent reasonably believed the taxpayer wished the notice to be sent." *Weinroth*, at 435 [emphasis added]. This is the general view among the circuits, and is clearly in opposition to the position that the IRS is entitled to ignore significant surrounding facts and circumstances which would indicate to any reasonable person that the taxpayer does not wish the notices to be sent to the old address. No other authority cited by the Government or the Court of Appeals, or otherwise known to Petitioner, supports this position that the surrounding facts and circumstances need not be considered.

This decision is precedent-setting. The new interpretation is listed as a headnote in the Federal Reporter:

> **3. Internal Revenue *[key]* 4547**
>
> Internal Revenue Service (IRS) must use reasonable diligence in ascertaining taxpayer's address, *but IRS is entitled to rely on those documents which are submitted by taxpayer in mailing notice of income tax deficiency*. 26 U.S.C.A. § 6212(b).

Gille v. United States, 33 F.3d 46 (10th Cir. 1994) [italics added]. This headnote, though not authoritative, and arguably self-contradictory, is nevertheless used in the West Key Number System, and may find its way into annotations, Government briefs, and eventually other

decisions (not necessarily in that order).

The interpretation creates a loophole, which Congress could not have intended, through which the IRS may deprive a taxpayer of notice and opportunity to be heard in Tax Court, as it did to Gille, and through which it may deprive a taxpayer of property without notice or opportunity to be heard, as it attempted to do to Gille and will succeed in doing if the decision of the Court of Appeals is allowed to stand.

Gille established to the satisfaction of the District Court that the IRS was officially and authoritatively notified of the Gilles' move by each notice which the United States Postal Service returned undeliverable, and that the IRS in fact *knew* the Gilles' correct address prior to sending the notice of deficiency. However, the court of appeals says that the IRS *was entitled to believe* that Gille wished to have all notices sent to an old address from which the notices would be returned undeliverable—i.e. to believe that Gille wished to receive no notice or opportunity to be heard.

The court of appeals ruling that the IRS was entitled to send a series of notices to an address from which all notices were being returned undeliverable therefore sets a dangerous precedent. The IRS mailed the notice of deficiency (and later the notice of assessment and the notice of intent to levy) to a bad address, *knowing* that it would not be received. No reasonable person would consider this a reasonable practice. But it gets worse.

The court of appeals acknowledged 1) that the IRS was aware that the "last known address" was taken from a *joint* tax return, 2) that the IRS was aware that the Postal Service had forwarded a notice regarding that same joint

return to Oklahoma (which makes evident the Gilles' desire that any notices be forwarded to Oklahoma), 3) that the IRS had several communications to and from the Oklahoma address to resolve the joint return, and 4) that the Oklahoma communications started with a letter from Mrs. Gille asking the IRS to respond to an attorney's address, *so her husband would not know* how she was handling their joint tax matter[3] (making it obvious that Mr. Gille lived at the Oklahoma address). Yet the court of appeals held that the IRS was entitled to ignore the Oklahoma address, which the IRS and the Postal Service had already used in regard to this return, and to ignore the fact that recent notices to the Utah address had all been returned undeliverable.

The statutes allowing the IRS to send a notice to the last known address serve as a means to protect the Commissioner in exceptional cases, not as a license for the IRS to intentionally deny due process. 26 U.S.C. § 6213(b).

When the IRS is aware that multiple prior notices to an address have all been returned undeliverable, it is a mockery, an abuse, and evasion of the law to claim that a "last known address" provision entitles the IRS to send another notice to the same address, merely going through the motions of due process, exalting form over substance, and nullifying the people's right not to be deprived of property without due process.

The IRS must not be allowed thus to spurn the American people and their laws and their rights. The

---

[3]The Court of Appeals mischaracterized her statement as a reference to *her*—rather than *their*—tax matter. 33 F.3d at 48.

Tenth Circuit is leading the development of the interpretation of the term "last known address," upon which this Court has not ruled, in a direction contrary to the intent of Congress. It is appropriate that this Court take certiorari to prevent any further deterioration of the right to due process of law.

2. The holding that the IRS is entitled to ignore clear evidence that a taxpayer has moved, conflicts with other circuits.

It is well established among the circuits that, absent clear and concise notice to the contrary, the address on the most recent return is considered as the last known address for purposes of the notice of deficiency. Until this decision, however, no circuit had taken this to mean that the IRS is entitled to ignore clear evidence that a taxpayer has moved. The Tenth Circuit is the first to state that the IRS is entitled to send notice after notice after notice to an address when the IRS is aware that each notice to that address is returned undeliverable.

The following are representative of the court of appeals holdings that when the IRS is aware that a taxpayer has moved, the IRS has a duty to exercise reasonable diligence to ascertain the new address, even when there was no explicit notice of the change of address directly to the IRS from the taxpayer himself: *Berger v. C.I.R.*, 404 F.2d 668 (3rd Cir.1968) (allowed the IRS to ignore a taxpayer's explicit notice of new address, based on information from other sources); *Powell v. C.I.R.*, 958 F.2d 53, 55 (4th Cir.1992), *cert. den.* 113 S.Ct. 440, 121 L.Ed.2d 359 (1992) (allowed access to Tax Court out of time, because Postal Service failed to forward notice: "We note that if the IRS

had acknowledged receiving the undelivered notice back from the Postal Service, it would have been proof positive that the same had not been delivered, and so the mailing would have necessarily been insufficient, absent further inquiry on the part of the IRS, which was never made."); *Mulder v. C.I.R.*, 855 F.2d 208 (5th Cir.1988) (notice held invalid where two prior notices had been returned undeliverable[4]); *McPartlin v. C.I.R.*, 653 F.2d 1185 (7th Cir.1981) (factors considered significant included the fact that the taxpayers filed a change of address with the Postal Service, and the IRS had no certified mail receipt for the notice of deficiency); *Rorex v. Traynor*, 771 F.2d 383 (8th Cir.1985) (notice of levy was held an unauthorized disclosure where IRS knew taxpayer had received no notice and therefore had neither neglected nor refused to pay); *Wallin v. C.I.R.*, 744 F.2d 674, 677 (9th Cir.1984) (allowed access to Tax Court out of time, because four letters returned undeliverable provided the IRS with notice of the move)[5]; *Armstrong v. Commissioner*, 15 F.3d 970 (10th Cir. 1994) (allowed IRS to ignore address on the most recent return, based upon address obtained by due

---

[4]The court noted, but did not consider in its reasoning, that shortly before the notice of deficiency was issued by the Salt Lake City office of the IRS, the taxpayer provided his new address in a letter to the Austin Service Center.

[5]The same circuit had previously held that discovery of a newer address, by another agent attempting to collect an unrelated tax liability, did not invalidate a notice of deficiency sent to the address on the most recent return. *United States v. Zolla*, 724 F.2d 808 (9th Cir.1984), *cert. den.* 469 U.S. 830, 105 S.Ct. 116, 83 L.Ed.2d 59 (1984). However, the IRS had no reason to suspect that the address shown on the most recent return was not valid. No notice sent to that address had been returned undeliverable.

diligence); *Marks v. C.I.R.*, 947 F.2d 983 (D.C. Cir. 1991) (notice held valid where IRS mailed duplicate notices to four addresses, having by reasonable diligence determined all other addresses were bad).

There is, however, no sure authority among the circuits, and this case is a consequence of the absence of a controlling decision by this Court. It is appropriate that this Court grant certiorari to establish a reliable authority.

3. The implied holding that the IRS may intentionally deny access to Tax Court conflicts with the intent of Congress and applicable decisions of this Court.

The issue in *Laing v. United States*, 423 U.S. 161, 46 L.Ed.2d 416, 96 S.Ct. 473 (1976), was whether a notice of deficiency was required after a termination assessment. Even though the statutes for termination assessment at that time did not explicitly require a notice of deficiency, this Court held that the taxpayer's right to prepayment litigation in Tax Court is so important that it may not be denied by the IRS.[6] The essence of the reasoning was that denial of access to Tax Court is against the intent of Congress:

> Denial of an opportunity to litigate in the Tax Court is out of keeping with the thrust of the Code, which generally allows income-tax payers access to that court.

Laing v. United States, 432 U.S. at 176, 46 L.Ed.2d at 429.

---

[6]As a result of this decision, Congress changed the I.R. Code to require a notice of deficiency after a termination assessment.

As this Court has stated,

> For more than a century the central meaning of procedural due process has been clear: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." [cites omitted]

Fuentes v. Shevin, 407 U.S. 67, 80, 32 L.Ed.2d 556, 569, 92 S.Ct. 1983 (1972). For this reason, Congress has provided since 1924 that a notice of deficiency must be issued to allow the taxpayer to dispute the deficiency before collection actions begin. *Laing*, 423 U.S. at 181, 46 L.Ed.2d at 432.

When the IRS knowingly denied Gille the notice of deficiency, which would have given him access to Tax Court, it was against the intent of Congress. The Tenth Circuit holding that the IRS is entitled to knowingly deny a notice of deficiency, even when doing so deprives the taxpayer of access to Tax Court, conflicts with the intent of Congress and holdings of this Court, and suggests that certiorari should be granted to resolve the conflict.

4. Reversal of the district court's finding of liability, rather than remanding for findings of fact and conclusions of law on the other grounds, so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

In addition to its explicit holding regarding the last known address for the notice of deficiency, the Tenth Circuit's indiscriminate reversal also dismissed, presumably

as insignificant, numerous statutory violations, each one of which rendered some or all of the disclosures unauthorized. The Tenth Circuit mischaracterized Gille's theory of the case as a single issue: i.e., whether the notice of deficiency was sent to the last known address. The general rule is that a party is bound by and to the theory upon which he presents his case. *In Re Linda Coal*, 255 F.2d 653, 656-657 (3rd Cir.1958). Actually, however, Gille's theory of the case involved 5 issues of fact and 26 issues of law, involving numerous violations of procedural due process, each one of which rendered one or more disclosures unauthorized. *See* Appendix H, "Plaintiff's Issues in Agreed Pretrial Order".

The wholesale reversal, without consideration of the other issues, is a violation of Fed.R.Civ.P. 52(a). *Sherwin v. Welch*, 319 F.2d 729, 732 (D.C. Cir. 1963) ("Since there are no findings to support a conclusion on that issue, the case must again be remanded for findings of fact and conclusions of law upon that issue, as required by Fed.R.Civ.P. 52(a).").

When an appellate court reverses on one issue, and there were other issues which the lower court has not passed upon, the accepted and usual course of judicial proceedings is to remand for determination of the other issues; e.g. *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) (Supreme Court remanded to court of appeals for consideration of other grounds); *Dean Milk Co. v. Madison*, 340 U.S. 349, 95 L.Ed. 329 (1951) (Supreme Court remanded for state court to consider other portions of ordinance); *United States v. Beach*, 324 U.S. 193, 89 L.Ed. 865 (1945) (Supreme Court remanded for consideration of other grounds); *Epstein v.*

Goldstein, 110 F.2d 747, 748 (2d Cir. 1940) (Questions not argued on the appeal and never decided by the trial judge were not properly before the appellate court but had to be decided by the trial judge).

The Court of Appeals only based its reversal on the "last known address" for the notice of deficiency; but there is a separate "last known address" provision for each of the three notices which must be given before the IRS may levy on property: notice of deficiency - § 6212(b), notice of assessment - § 6303(a), and notice of intent to levy ("final notice") - § 6331(d)(2)(c). The requirements are different for each: e.g. the notice of deficiency and the final notice must be sent "by certified or registered mail," whereas the notice of assessment may be sent "by mail." The last known address for one notice is not necessarily the last known address for another.

The Courts of Appeals have heretofore held that return of a prior notice undeliverable places the IRS on notice that a taxpayer has moved (*see* authorities listed under Reason #2, above). In this case, even if the notices which were returned undeliverable prior to the notice of deficiency could be ignored, the return of the notice of deficiency undeliverable apprised the IRS of the move before it issued the notice of assessment. Likewise, the return of the notice of assessment apprised the IRS of the move before it issued the final notice.

At trial, Gille depicted the relevant statutory procedural steps graphically, on an overhead projector, as links in a chain of authorization. *See* Appendix I. The District Court was able to determine the issue of liability by finding that one of the early links in this chain was not intact. Since this rendered all of the disclosures

unauthorized, the factual and legal issues involving later links (procedural violations) were rendered academic. The written opinion addressed only the mailing of the notice of deficiency (Issue of Law #13), finding that under the circumstances, the address was not the last known address. However, the factual and legal issues relating to other procedural violations were made relevant once again, when the court of appeals reversed the one issue upon which the district court had ruled. The court of appeals then erred by failing to remand for findings of fact and conclusions of law regarding those remaining issues, as required by Fed.R.Civ.P. 52(a). *Sherwin v. Welch*, 319 F.2d at 732.

This departure is not mere harmless error. In this case, the IRS *gave* notice of deficiency for 1982, and received payment in full. Then it *denied* notice of deficiency and other notices for 1983, and now wishes to be exonerated of a $16,000 liability for the denials of due process, and to have nearly $10,000 in alleged taxes placed beyond dispute, along with tens of thousands of dollars in penalties and interest, for a total reward probably in excess $50,000 for its perfidy. This is exactly the opposite of the intent of Congress, and its laws providing for due process.

What the IRS is permitted to do to one, it will do to many. The court of appeals departure in this case from the usual course of judicial proceedings, effectively condoning intentional denial of due process and creating a manifest injustice, calls for an exercise of this Court's supervisory powers via certiorari.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals.[7]

Respectfully submitted,

J. Charles F. Gille, *pro se*
1700 W. Quantico St.
Broken Arrow, Oklahoma 74011
Telephone: 918-455-5968

January 13, 1995

[7] If this Court elects not to address the issues presented in this writ at this time, Petitioner requests that the writ issue and that the matter be remanded to the Court of Appeals with instructions to remand to the District Court for findings of fact and conclusions of law on the remaining issues pursuant to Fed.R.Civ.P. 52(a).

JUDGMENT TO BE REVIEWED

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

J. Charles F. GILLE, Plaintiff-Appellee,

v.

UNITED STATES of America, Defendant-Appellant.

No. 93-5203.

August 17, 1994.

Appeal from the United States District Court for the Northern District of Oklahoma (D.C. No. CV-90-468-E).

J. Charles F. Gille, pro se.

Loretta C. Argrett, Assistant Attorney General, Jonathan S. Cohen, Mary Frances Clark, Attorneys, Tax Division, Department of Justice, Washington, D.C. (Stephen Charles Lewis, United States Attorney, Tulsa, Oklahoma, of Counsel) for Defendant-Appellant.

Before MOORE and KELLY, Circuit Judges, and BABCOCK,** District Judge.

**Honorable Lewis T. Babcock, District Judge, United States District Court for the District of Colorado, sitting by designation.

PAUL KELLY, Jr., Circuit Judge.

The government appeals the district court's judgment awarding damages pursuant to 26 U.S.C. § 7431 to plaintiff/taxpayer J. Charles F. Gille (taxpayer) arising from the allegedly unauthorized disclosure of tax return information, 838 F.Supp. 521. Because we find that the Internal Revenue Service (IRS) properly sent the notice of deficiency to taxpayer's last known address as required by 26 U.S.C. § 6212(b), thus making its collection activities authorized, we reverse.[1]

Taxpayer and his wife Vicki filed their 1982 tax return jointly, listing an Orem, Utah address. Sometime after 1982, taxpayer and his wife moved from Utah to Oklahoma. Taxpayer did not notify the IRS of his new address, nor did he file a tax return for 1983 or for subsequent years.

In January 1985, the IRS mailed a notice of balance past due relating to the 1982 income tax return to taxpayer's previous Orem address. The Postal Service forwarded this notice to taxpayer and his wife in Oklahoma City. In May 1985, Vicki's attorney mailed a cashier's check to the IRS representing payment in full for the 1982 tax year. He accompanied the check with a letter requesting that the fact of payment be held in confidence by the IRS and stating that Vicki "does not wish to involve her husband in her efforts." App. at 144. Later in 1985, Vicki wrote to the IRS, identifying herself as Vicki Lynn Rebeck (Gille), using her new Oklahoma City address, and requesting a statement of account from the IRS. Upon receipt of this letter, the IRS changed Vicki's address in its files, but did not change

[1]After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

taxpayer's address.

Beginning in 1985, Vicki filed tax returns under her maiden name and as "married but filing separately." Those returns did not include taxpayer's name or his social security number. In January 1987, the IRS created a substitute return for taxpayer for 1983 on which it used taxpayer's name and the social security numbers of both taxpayer and his wife. In October 1987, the IRS began a series of collection efforts relating to taxpayer's 1983 tax liability. The first of these efforts was the mailing of a "preliminary letter" to taxpayer at the Orem, Utah address. The Postal Service returned this letter to the IRS as "undeliverable." Four subsequent notices, including the statutory notice of deficiency, were also sent to the Orem address and similarly returned by the Postal Service. Eventually, in April 1989, the IRS finally discovered taxpayer's then-current address in Broken Arrow, Oklahoma. During the course of this investigation, certain disclosures were made by the IRS, and various notices of levy were mailed.

Taxpayer brought suit seeking damages for unauthorized disclosure of tax return information in violation of 26 U.S.C. § 6103(a) of the Internal Revenue Code. His theory was, because the notice of deficiency had not been sent to his last known address, the tax collection activities springing from that notice were unauthorized and, therefore, the disclosure of return information associated with those collection activities was similarly unauthorized.

The district court, holding that the notice of deficiency was invalid because it was not sent to taxpayer's last known address as required by 26 U.S.C. § 6212, awarded taxpayer $16,000 in damages. In so doing, the court held that the IRS had failed to exercise due diligence in ascertaining taxpayer's last known address, because it could have found that address

by cross reference to taxpayer's wife's file data. The government now appeals.

The IRS is required to give a taxpayer notice before assessing an income tax deficiency. 26 U.S.C. § 6213(a). To give effective notice, the IRS must send notice of the deficiency by certified or registered mail. *Id.* § 6212(a). Notice of deficiency is sufficient, however, if mailed to a taxpayer's last known address, regardless of receipt. *Id.* § 6212(b). Whether the IRS has mailed a notice to a taxpayer's last known address is a mixed question of fact and law, but, because the last-known-address inquiry is primarily a factual one, we review the decision of the district court for clear error. *Armstrong v. Commissioner*, 15 F.3d 970, 973 (10th Cir. 1994).

Although not defined in the Internal Revenue Code, case law has interpreted the term "last known address" to mean "'that address to which the IRS reasonably believes the taxpayer wishes the notice sent,'" *id.* (quoting *Cyclone Drilling, Inc. v. Kelley*, 769 F.2d 662, 664 (10th Cir. 1985) (citation omitted)). Unless the taxpayer can prove that he or she has provided clear and concise notice of a new address, the IRS is entitled to rely on the address used on the return for the tax year in question or, as in this case, from the taxpayer's most recent tax return. *See Id*, at 973-74. Here, taxpayer's last tax return was filed in 1982 and listed the Orem, Utah address. No further communication was ever received from taxpayer notifying the IRS of his move to Oklahoma.

While the IRS must use reasonable diligence in ascertaining a taxpayer's address, *Cyclone Drilling*, 769 F.2d at 554, "the IRS is entitled to rely on those documents which are submitted by the taxpayer," *Armstrong*, 15 F.3d at 974. That Vicki had corresponded with the IRS and had notified

the agency of her new address is not tantamount to notice from taxpayer that he had also moved, particularly since Vicki had filed separately and pointedly stated earlier that she did not want to involve her husband in her tax matters. Indeed, the IRS would run a risk in relying on address information about a taxpayer submitted by a third party. *See United States v. Zolla*, 724 F.2d 808, 811 (9th Cir.) (notice sent to temporary address ineffective if not received), *cert. denied*, 469 U.S. 830 (1984). Under these circumstances, taxpayer, who did not bother to file a tax return after 1982, will not now be heard to complain that the IRS was not adequately diligent in its efforts to track him down.

That notices sent to Orem were returned to the IRS as "undeliverable" does not render the notice of deficiency ineffective. As noted above, such notices are valid irrespective of their receipt as long as they are sent to a taxpayer's last known address. *Armstrong*, 15 F.3d at 973, 975; *see also Guthrie v. Sawyer*, 970 F.2d 733, 737 (10th Cir. 1992). Taxpayer's argument that the IRS thus failed to demand payment is unavailing, as is his argument based on the alleged failure of the IRS to follow its internal procedures. "'It is well-settled . . . that the provisions of the [procedures] manual are directory rather than mandatory . . . and clearly do not have the force and effect of law.'" *Armstrong*, 15 F.3d at 975 (quoting *Marks v. Commissioner*, 947 F.2d 983, 986 n.1 (D.C. Cir. 1991)).

The judgment of the United States District Court for the Northern District of Oklahoma is REVERSED, and this case is REMANDED for entry of judgment consistent herewith. The mandate shall issue forthwith.

[End of ruling]

DISTRICT COURT JUDGMENT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

J. Charles F. Gille, Plaintiff,

v.

United States of America, Defendant.

No. 90-C-468-E,

July 19, 1993.

ORDER AND JUDGMENT

Findings of Fact

1. On May 31, 1983, Plaintiff J. Charles F. Gille and his wife Vicki L. Gille filed a joint 1982 tax return showing his address to be 632 S. 1000 W., Orem, Utah, 84057.

2. Plaintiff did not file a tax return, joint or otherwise, for the tax year 1983.

3. In September of 1984, Plaintiff and Vicki Gille filed a change of address form with the United States Post Office notifying them of their move from Utah.

4. On January 7, 1985, the IRS issued and mailed a notice of balance past due relating to the deficiency for the tax year 1982. Although the IRS mailed that notice to the Orem, Utah address, the United States Post Office forwarded the notice to the plaintiff and his wife, 6512 N. Missouri, Oklahoma City, Oklahoma, 73111-7928.

5. In January of 1985, the United States Post Office forwarded the Gilles' mail, including the Notice of Deficiency for the tax year 1982, to their Oklahoma City address.

6. In March of 1985, Plaintiff and Vicki Gille moved to

2944 Lakeside Drive, Oklahoma City, Oklahoma. The plaintiff again filed a change of address form with the United States Post Office.

7. In April of 1985, Vicki Gille became employed at Macklanburg-Duncan Co. in Oklahoma City, Oklahoma. A bank account was soon thereafter opened in Vicki's name at Liberty National Bank & Trust in Oklahoma City, Oklahoma for the purpose of the direct deposit of her paychecks from Macklanburg-Duncan.

8. On May 25, 1985, Bruce F. McGuigan, acting under power of attorney for Vicki L. Gille, mailed to the IRS at its Ogden, Utah center, a cashier's check in the amount of $4,982.48 representing full payment of the deficiency reflected in the January 1985 notice of deficiency for the tax year 1982. The accompanying letter from Mr. McGuigan stated in pertinent part as follows[1]:

> I am the attorney for [Mrs. Gille]. She and her husband filed a joint return for the year, 1982. I understand there has been considerable correspondence between the Internal Revenue Service and her husband. She wishes to resolve this matter, personally, between her and the Internal Revenue Service.
>
> Enclosed is a Cashier's Check in the amount of $4,982.48, which is in payment of the $4,713.42 in tax, penalty and interest reflected in your notice of January 25, 1985, [plus interest on the deficiency] . . . .
>
> Mrs. Gille does not wish to involve her husband in her efforts to resolve this matter, thus we will

[1]Mrs Gille was present at the trial and consented to the disclosures of her tax return information for purposes of these proceedings.

> appreciate your directing all correspondence pertaining to this matter to me (enclosed is Power of Attorney, Form 2848) . . . .

9. On July 1, 1985, Vicki Gille mailed a handwritten letter requesting a receipt for all of the monies she had paid to the IRS. The letter referred the IRS to "Vicki L. Rebeck (Gille)", identified her social security number, and requested the IRS mail the receipt for the monies collected to: "Vicki Lynn Rebeck (Gille) c/o 6512 N. Missouri, Oklahoma City, OK, 73111."

10. On August 14, 1985, the IRS issued and mailed a reply to "Vicki Lynn Rebeck" at her Oklahoma City address indicating that they were looking into her case and would respond more fully in sixty days. The letter stated in part:

> If you have any questions about this letter, please write to us at the address shown on this letter. If you prefer you may call the IRS telephone number listed in your local directory. An employee there may be able to help you, but the office at the address shown on this letter is most familiar with your case.

The address shown on the letter was "Department of the Treasury, Internal Revenue Service, Ogden, UT, 84201."

11. On October 14, 1985, the IRS issued and mailed a letter to Vicki Rebeck at her Oklahoma City address which made reference to Mr. Gille's taxpayer identification number as follows:

> Enclosed is a record of your 1982 account (filed jointly under 443-50-7817). We hope this information is helpful.
>
> If you have any questions, please write to us at the address shown on this letter. . . .

12. The IRS recorded a change of address for Vicki

Rebeck (Gille) in October of 1985. The IRS did not at this time record a change of address for Charles Gille.

13. In January of 1986, Vicki filed a "married but filing separate" tax return for the tax year 1985 which reflected the Gilles' Oklahoma City address. The return did not reflect the name or social security number of her spouse, Charles F. Gille. The tax refund received by her for that year was deposited into her Liberty National Bank & Trust account.

14. On May 5, 1986, a notice of deficiency *[sic: actually a preliminary notice]* was mailed to Charles F. Gille at the Utah address. The notice was returned to the IRS as undeliverable.

15. On May 26, 1986, another notice of deficiency *[sic: actually a different preliminary notice]* was mailed to Charles F. Gille at the Utah address. The notice was returned to the IRS as undeliverable. Specifically, the outside of the notice stated, "RETURN TO SENDER, NO FORWARDING ORDER ON FILE, UNABLE TO FORWARD." *[sic: this sticker was on the letter in ¶ 20, below]* The change of address form filed in 1985 by the taxpayer had expired.

16. In December of 1986, the IRS mailed a Form 1040 to Vicki Gille at the Oklahoma City address. The Form 1040 had an address label affixed to it which reflected the Gilles' Oklahoma City address. Vicki filed that form 1040 for the tax year 1986 in February of 1987. The return did not reflect either the name or social security number of her spouse Charles F. Gille.

17. In January of 1987, the IRS filed a "dummy" Form 1040 for the tax year 1983 using Charles F. Gille's name, but reflecting both Charles' and Vicki's social security numbers. The Orem, Utah address was filled in on that dummy form, in spite of the IRS's communications with Mrs. Gille and the

IRS's knowledge of the couple's Oklahoma City address.

18. A tax deficiency for the tax year 1983 was assessed against plaintiff on March 23, 1987.

19. Revenue Officer Timothy Andrew Anderson was initially assigned to the J. Charles F. Gille file for investigation. Anderson was located in the Ogden, Utah branch of the Internal Revenue Service. At the time of commencing this investigation, Anderson was still in training and under supervision. All notices issued in reference to J. Charles F. Gille were sent from the Ogden, Utah branch of the Department of Treasury, Internal Revenue Service.

20. In October of 1987, the IRS mailed a "preliminary letter" regarding the assessed tax liability for the year 1983 to Charles F. Gille at the Utah address. The letter was returned as undeliverable by the United States Post Office to the IRS in the same month.

21. On December 31, 1987, a "notice of deficiency" for Plaintiff's 1983 individual income tax liability was issued and mailed to plaintiff at the Orem, Utah address. In January of 1988, the notice was returned by the United States Post Office as undeliverable.

22. In February of 1988, Vicki filed her Form 1040 tax return "married but filing separate" using the IRS label which reflected the Oklahoma City address. The return did not reflect either the name or social security number of her spouse, Charles F. Gille.

23. In July of 1988, Revenue Officer Timothy Andrew Anderson ordered an "IRP" transcript using both Charles' and Vicki's social security numbers.

24. In August of 1988, the IRS mailed a "notice of assessment" to Charles F. Gille to the Utah address. The notice was returned as undeliverable by the United States

Post Office to the IRS.

25. In September of 1988, the IRS mailed a "final notice" of assessment and intent to levy to Charles F. Gille to the Utah address. The notice was returned as undeliverable by the United States Post Office to the IRS.

26. In November of 1988, the IRS issued and mailed a notice of levy on Vicki's paychecks to Macklanburg-Duncan Company, a notice of levy on Vicki's accounts at Liberty Nation *[sic]* Bank & Trust, and a notice of federal tax lien in Utah.

27. In November of 1988, the United States Post Office returns as undeliverable the "Taxpayer Copy" of the notice of federal tax lien in Utah.

28. On January 25, 1989, Plaintiff J. Charles F. Gille moved to 1700 West Quantico Street, Broken Arrow, Oklahoma, 74011. Plaintiff filed a change of address form with the United States Post Office.

29. On January 27, 1989, the IRS issued and mailed the following items to the stated entities: a notice of levy to the Burroughs Corporation, a notice of levy to Lytron Systems, a notice of levy to Burroughs Employees Credit Union, a notice of levy to American Savings Association, a notice of levy to Utah Technical College, a notice of levy to Universal Campus Credit Union, and a notice of lien to the County Clerk in Tulsa *[sic: actually Utah]* County.

30. On March 24, 1989, Revenue Officer Tim Anderson mailed a postal tracer to the United States Post Office in Orem, Utah reflecting the Gilles' Utah address. The tracer was returned to the IRS by the United States Post Office reflecting that John Charles Gille was "not known at address given."

31. On April 4, 1989, Revenue Officer Tim Anderson

visited the current resident at 632 S. 1000 W., Orem, Utah, to investigate as to the current location of Charles F. Gille.

32. On April 4, 1989, Revenue Officer Tim Anderson visited the current resident at 630 S. 1000 W., Orem, Utah, to investigate into the current location of Charles F. Gille.

33. On April 4, 1989, Revenue Officer Tim Anderson mailed a postal tracer to the United States Post Office in Oklahoma City, Oklahoma, reflecting the Oklahoma City Address. The postal tracer was returned to the IRS by the United States Post Office with the Broken Arrow address on it.

34. On April 14, 1989, Revenue Officer Tim Anderson mailed a postal tracer to the United States Post Office at Broken Arrow. The tracer was returned by the United States Post Office stating "mail is delivered to the address given."

35. In a letter to the IRS dated June 2, 1989, Charles F. Gille indicated that he never actually received any of the notices of deficiency and requested a variety of information pursuant to the Freedom of Information Act. This letter is referred to by the IRS as a "protest letter".

36. On June 12, 1989, Charles F. Gille's "protest letter" is received by the IRS, and specifically by Revenue Officer Tim Anderson.

37. On October 5, 1989, Revenue Officer Victor Christian made a field call to the Broken Arrow address and saw the following vehicles in the driveway—a van, a Pontiac wagon and a boat. Revenue Officer Christian recorded the tag numbers on each of the vehicles. The next day the Revenue Officer called the Oklahoma Department of Motor Vehicles and the County Courthouse and determined that none of the assets were in Charles Gille's name.

Conclusions of Law

1. Plaintiff contends that the agents of the IRS knowingly made unauthorized disclosures of Plaintiff's return information by virtue of the fact that the assessment made against Plaintiff was procedurally invalid. Plaintiff asks for monetary relief as a result of these alleged wrongful disclosures.

2. Three issues have been presented for determination: (1) whether this court has jurisdiction over the subject of this action,[2] (2) whether the notice requirements set forth at Title 26, United States Code, Section 6303 were followed such that the IRS exercised reasonable diligence in attempting to determine Plaintiff's correct address where express "clear and concise" notice of a change of address was not given directly by the Plaintiff to the IRS, and (3) whether disclosures of Plaintiff's tax return information were made in violation of 26 U.S.C. § 6103.

3. With respect to the first of the three issues, we begin by noting that a party may raise subject matter jurisdiction as an issue at any stage of the proceedings by the parties. *First State Bank & Trust Co. of Guthrie, Oklahoma v. Sand Springs State Bank of Sand Springs, Oklahoma*, 528 F.2d 350 (10th Cir. 1976). In this case, the issue was first raised post-trial by the government. Specifically, the government asserts herein that Mr. Gille cannot challenge the procedural validity of the assessment until after he has paid the deficiency and brings a refund suit under Title 26, United States Code, Section 7422(a). The government relies in particular on a

[2]Although the parties agreed in the agreed pre-trial order that this court had subject matter jurisdiction over this action, defendant has raised this issue in its proposed findings of fact and conclusions of law, which was submitted as a post-trial brief.

line of cases which have held that when the taxpayer challenges the merits of a tax assessment (including challenges to notice and demand), rather than merely challenging the procedural regularity of the tax lien and the procedures used to enforce the lien, then sovereign immunity is not waived under § 2410 (action to quiet title) and a district court does not have jurisdiction over an action to quiet title until the taxpayer has paid the taxes in dispute and seeks refund pursuant to § 7422(a). *See Schmidt v. King*, 913 F.2d 837 (10th Cir. 1990) (holding that the taxpayer's action characterized as one to quiet title actually challenged the deficiency assessment, and specifically the notice and demand given, and thus the district court lacked jurisdiction over the action until after the taxpayer had paid the taxes in dispute). *Egbert v. U.S.*, 752 F.Supp. 1010, 1014 (D.Wyo. 1990) ("when taxpayers contest assessment and notice and demand procedures they are actually challenging the adjudication of whether they owe taxes"), *aff'd*, 940 F.2d 1539 (10th Cir. 1991), *cert denied*, ___ U.S. ___, 112 S.Ct. 666, 116 L.Ed.2d 756 (1991). This is not a quiet title action under 26 U.S.C. § 2410. The government's reliance on this line of cases appears to be misplaced in that this action is not one to quiet title and therefore does not challenge whether the taxes are due and owing. Rather Plaintiff here merely seeks recovery for alleged unauthorized disclosures on the grounds that the notices of deficiency were procedurally invalid.

4. The next issue for resolution is whether notice pursuant to Title 26, United States Code, Section 6303(a) was given. The IRS is required by § 6212 to send a notice of deficiency to the taxpayer at his/her "last known address" to satisfy the notice requirement. The term "last known address" is not defined in the statutes or the regulations, but instead has come to be defined by a substantial body of case law. The

term has been defined to mean "'that address to which the IRS reasonably believes the taxpayer wishes the notice sent.'" *Cyclone Drilling, Inc. v. Kelley*, 769 F.2d 662, 664 (10th Cir. 1985) (quoting *United States v. Ahrens*, 530 F.2d 781, 785 (8th Cir. 1976); *Sorrentino v. Ross*, 425 F.2d 213, 215 (5th Cir. 1970); *Delman v. Comm'r of Internal Revenue*, 384 F.2d 929, 932 (3d Cir. 1967), *cert. denied*, 390 U.S. 952, 88 S.Ct. 1044, 19 L.Ed.2d 1144 (1968)). As explained by the Tenth Circuit in *Cyclone Drilling*:

> . . . In recognition of obvious nationwide administrative realities, the burden is on the taxpayer to provide "clear and concise" notice of his current address to the IRS; the IRS is otherwise entitled to rely on the address shown on the taxpayer's tax return for the year in question. "Clear and concise" notice is notice by which the taxpayer indicates to the IRS that he wishes the new address to *replace* all old addresses in subsequent communication. Such an indication of replacement may be either explicit or implicit. . . .
>
> In general, "[t]he relevant inquiry pertains to the IRS's knowledge rather than to what may in fact be the taxpayer's current address in use.
>
> The IRS is, however, required to use "reasonable diligence" in attempting to ascertain the taxpayer's correct address. The burden of proof is on the taxpayer to prove that this "reasonable diligence" was not exercised.

Id. at 664 (citations omitted).

5. Mr. Gille contends that the facts warrant a finding that the IRS failed to exercise reasonable diligence in that they had located his wife, with whom his last return was filed, at their Oklahoma City address, and yet they sent all the

notices to the Utah address. The IRS maintains that "administrative realities" preclude them from having to cross-reference between the husband and wife. We cannot agree.

6. It is true that the Tenth Circuit Court of Appeals has held that cross-referencing addresses between business-related return information and individual return information amounts to an "unreasonable administrative burden." *Howell v. U.S.*, 982 F.2d 528 (10th Cir. 1992) relying on *Stein v. Comm'r*, 60 T.C.M. (CCH) 211, 216 (1990) (recognizing unreasonable administrative burden of cross referencing individual taxpayer accounts with business accounts, and noting that "[t]axpayers can, and more often than not do, have different addresses for their residence and their business") and relying on *Lueck v. Comm'r*, 60 T.C.M. (CCH) 27, 30-31 (1990) (recognizing that IRS maintains business and individual tax records separately)); and *Guillen v. Barnes*, 819 F.2d 975 (10th Cir. 1987) (refusing to impute knowledge of an address change to the division of the IRS that issued the deficiency notices, based on information received in another IRS division, from a W-4 form, that was not identified as new permanent address information). However, the cross-referencing required of the IRS in this case amounted to no more than identifying Mrs. Gille's social security number which was located in the file for Mr. Gille on the "dummy" joint return. Once Mrs. Gille's name was identified to be Vicki Rebek *[sic]*, the IRS needed only refer to her file to identify the Oklahoma City address. A direct letter from Mrs. Gille was mailed identifying their Oklahoma City address. The fact that the IRS sent a letter to Mrs. Gille at the Oklahoma City address in late 1985, cross-referencing her husband's social security number, illustrates the administrative ease with which the IRS could have mailed the notices to the Oklahoma City address.

7. Although the court does not in any way advocate the failure of any taxpayer to file tax returns, this court cannot find from the evidence presented that the IRS exercised reasonable diligence in attempting to ascertain Mr. Gille's correct address for purposes of satisfying the notification requirements of Title 26, United States Code, Section 6212.

8. The final issue for determination by this court is whether any disclosures were made in violation of Title 26, United States Code, Section 6103(a), which generally prohibits disclosure of tax return information by federal employees, except for the specific reasons enumerated by the statute. Section 6103 does permit disclosure of return information for the purposes of tax administration, as provided in subsection (k)(6):

> An internal revenue officer or employee may, in connection with his official duties relating to any audit, collection activity, or civil or criminal tax investigation or any other offense under the internal revenue laws, disclose return information to the extent that such disclosure is necessary. . . with respect to enforcement of any other provision of this title.

Recovery for wrongful disclosure under § 6103 requires a preliminary finding that the government knowingly or negligently failed to comply with required procedures prior to recording liens or levies, thereby rendering public communication relating to tax return information a negligent or wrongful disclosure.

9. As discussed above, the failure of the IRS to exercise reasonable diligence in attempting to ascertain Mr. Gille's correct address amounts to a negligent failure to comply with the required notification procedures. Accordingly, the collection activities were not authorized, and any disclosures of return information were in violation of § 6103.

10. We next turn to Title 26, United States Code, Section 7431 to determine the amount of damages to which Plaintiff is entitled for the unauthorized disclosures. Subsection (c) entitles plaintiff to the following:

> (a) . . . In any action brought under subsection (a), upon a finding of liability on the part of the defendant, the defendant shall be liable to the plaintiff in an amount equal to the sum of--
>
> (1) the greater of--
>
> (A) $1,000 for each act of unauthorized disclosure of a return or return information with respect to which such defendant is found liable, or
>
> (B) the sum of--
>
> (i) the actual damages sustained by the plaintiff as a result of such unauthorized disclosure, plus
>
> (iii) in the case of a willful disclosure or a disclosure which is the result of gross negligence, punitive damages, plus
>
> (2) the costs of the action.

Plaintiff put on no proof of any actual damages sustained, and the evidence does not warrant a finding of willfulness or gross negligence so as to justify an award of punitive damages. Plaintiff is therefore entitled to $1,000 for each unauthorized disclosure that occurred.

11. The government contends that any unauthorized disclosures fall within the "good faith but erroneous interpretation of § 6103" defense, available by virtue of Title 26, United States Code, Section 7431, subsection (b), and they therefore are protected from civil liability in this case. This court cannot find from the evidence presented that the

IRS agent acted in good faith where, as here, the IRS agent failed to attempt to identify the taxpayer's Oklahoma City address by referring to Mrs. Gille's social security number which was located on the dummy form filed by the IRS on behalf of the taxpayer and his wife. Furthermore, the fact that the IRS corresponded with the taxpayer's wife at their Oklahoma City address during the period in question suggests that the agent was not acting in good faith in attempting to determine the taxpayer's correct address.

12. All that remains is to determine the exact number of unauthorized disclosures of "return information" which occurred. "Return information" is defined in Title 26, United States Code, Section 6103(b)(2) as follows:

> (A) a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence or possible existence of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense, and
>
> (B) any part of any written determination or any background file document relating to such written determination (as such terms are defined in section 6110(b)) which is not open to public inspection under section 6110,
>
> but such term does not include data in a form which

> cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer. . . .

The court finds from the evidence that the following disclosures of "return information" were unauthorized and were not made in "good faith":

a. On or about November 7, 1988, Revenue Officer Tim Anderson issued and mailed a notice of levy to Macklanburg-Duncan Company.

b. On or about November 7, 1988, Revenue Officer Tim Anderson mailed notices of levy to Liberty National Bank.

c. On November 21, 1988, a notice of federal tax lien was filed in Utah County, Utah against Plaintiff at the Orem address.

d. On or about January 17, 1989, Revenue Officer Tim Anderson mailed a notice of levy to Burroughs Corporation.

e. On or about January 17, 1989, Revenue Officer Tim Anderson mailed a notice of levy to Lytron Systems.

f. On or about January 17, 1989, Revenue Officer Tim Anderson mailed a notice of levy to Burroughs Employees Credit Union.

g. On or about January 17, 1989, Revenue Officer Tim Anderson mailed a notice of levy to American Savings Association.

h. On or about January 17, 1989, Revenue Officer Tim Anderson mailed a notice of levy to Utah Technical College.

i. On or about January 17, 1989, Revenue Officer Tim Anderson mailed a notice of levy to Universal Campus Credit Union.

j. On March 2, 1989, Revenue Officer Tim Anderson

disclosed taxpayer's name and other "return information", as that term is defined in 26 U.S.C. § 6103(b)(2), to "Jerry" at Unisys.

k. On April 4, 1989, Revenue Officer Tim Anderson visited the current residents at 632 S. 1000 W., Orem, Utah, and disclosed "return information", as that term is defined in 26 U.S.C. § 6103(b)(2).

l. On April 4, 1989, Revenue Officer Tim Anderson visited the current residents at 630 S. 1000 W., Orem, Utah, and disclosed "return information", as that term is defined in 26 U.S.C. § 6103(b)(2).

m. On September 18, 1989, Revenue Officer Victor Christian filed a notice of lien against Plaintiff in Tulsa County, Oklahoma.

The government is therefore liable to the Plaintiff for each of these 13 unauthorized disclosures.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of the Plaintiff and against the Defendant in the amount of $13,000.00 plus the costs of this action.

ORDERED this 19th day of July, 1993.

JAMES O. ELLISON, Chief Judge

DISTRICT COURT CLARIFICATION

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

J. Charles F. Gille, Plaintiff,

v.

United States of America, Defendant.

No. 90-C-468-E,

August 31, 1993.

ORDER AND JUDGMENT

COMES NOW BEFORE THE COURT FOR CONSIDERATION the motion of Plaintiff for clarification of this Court's order captioned "Findings of Fact and Conclusions of Law" entered in July of 1993. The Plaintiff points out that, after finding that three separate postal tracers, each containing the taxpayer's name and the Internal Revenue Service address, were mailed and returned,[1] the Court thereafter failed to address whether such action on behalf of an agent of the IRS amounted to a "disclosure" of "return information" as those terms are defined by 26 U.S.C. § 6103. This Court's July order fully addressed the wrongful nature of the disclosures made in this case; this order will therefore only address whether the plaintiff's recovery includes recovery for the mailing of the postal tracers.

The specific issue is whether the information disclosed on the postal tracer forms qualifies as "return information" for

[1]The Court found that the first tracer was mailed on March 24, 1989, the second tracer was mailed on April 4, 1989, and the third tracer was mailed on April 14, 1989.

purposes of the liability imposed by sections 7431 and 6103 of Title 26 of the United States Code. Subsection (b)(2) of section 6103 defines "return information" to include:

> (A) a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence or possible existence of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense, and
>
> (B) any part of any written determination or any background file document relating to such written determination . . . which is not open to public inspection under section 6110,
>
> but such term does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer.

The Defendant herein argues, in response to Mr. Gille's motion for clarification, that under this Court's ruling any attempt by the IRS to locate a taxpayer who has not filed a return for a significant period of time will "run afoul" of section 6103.[2] The Court is not sympathetic to this argument.

---

[2]The court notes, however, that no legal authority was provided to support Defendant's position.

The point of section 6103 is to prohibit unreasonable violations of a taxpayer's privacy interests.[3] Accordingly, when the IRS is found to have been negligent in its collection efforts such that wrongful disclosures are made, the IRS is subject to liability. Once the court determines that the nature of the disclosures were wrongful (e.g. unauthorized and negligent), the scope of liability is broad under section 6103.

Accordingly, the court must find that a wrongful disclosure of "return information" includes a wrongful disclosure of a taxpayer's name on a postal tracer which also identifies the IRS as being the party looking for the taxpayer. Therefore, the Court must find that the IRS is additionally liable to the Plaintiff for the three additional wrongful disclosures made in violation of sections 7431 and 6103.

IT IS THEREFORE ORDERED that Plaintiff's motion to clarify is hereby granted, AND this order and judgment shall supplement the court's order entered in July of 1993.

IT IS ORDERED, ADJUDGED AND DECREED that judgment is further entered in favor of the Plaintiff and against the Defendant in the amount of $3,000.00.

ORDERED this 31st day of August, 1993.

JAMES O. ELLISON, Chief Judge

---

[3]It is clear from the legislative history surrounding the enactment of sections 7431 and 6103 that Congress intended to balance the taxpayer's reasonable expectation of privacy against the legitimate need of the Government to use information gathered by the IRS for other purposes. At the same time, Congress clearly did not intend to impede the ability of the IRS to collect tax liabilities. *See* Staff of Joint Comm.Int.Rev. Tax, 94th Cong., 2d Sess., General Explanation of the Tax Reform Act of 1976, at 314-15, 1976-3 C.B. Vol. 2) 326-27.

MANDATED JUDGMENT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

J. Charles F. Gille, Plaintiff,

v.

United States of America, Defendant.

No. 90-C-468-E,

August 25, 1994

JUDGMENT

Pursuant to the Order and Judgment of the Tenth Circuit entered on the 17th day of August, 1994, judgment is hereby entered in favor of DEFENDANT and against PLAINTIFF.

IT IS THEREFORE ORDERED that the Plaintiff Charles F. Gille recover nothing of the Defendant United States of America, AND this judgment shall replace the Court's judgment entered on the 31st day of August, 1993.

ORDERED this 25th day of August, 1994.

JAMES O. ELLISON, Chief Judge

REHEARING DENIED

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

J. Charles F. Gille, Plaintiff-Appellee,

v.

United States of America, Defendant-Appellant.

No. 93-5203,

October 24, 1994.

Before SEYMOUR, Chief Judge, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, KELLY and HENRY, Circuit Judges, and BABCOCK*, District Judge.

*The Honorable Lewis T. Babcock, United States District Court for the District of Colorado, sitting by designation.

This matter comes on for consideration of appellee's petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

AMENDMENT V, U.S. CONSTITUTION

United States Constitution, Amendment V.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. *[Underlining added]*

Sections of Internal Revenue Code of 1986 (26 U.S.C.)
[Underlining added]

§ 6103. Confidentiality and disclosure of returns and return information.

(a) General rule. Returns and return information shall be confidential, and except as authorized by this title—

(1) no officer or employee of the United States,

(2) no officer or employee of * * * *, and

(3) no other person * * * *,

shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under provisions of this section. For purposes of this subsection, the term "officer or employee" includes a former officer or employee.

(b) Definitions. For purposes of this section—

(1) Return. The term "return" means * * * *.

(2) Return information. The term "return information" means—

(A) a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence,

of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense, and

(B) any part of any written determination or any background file document relating to such written determination (as such terms are defined in section 6110(b)) which is not open to public inspection under section 6110,

but such term does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer. Nothing in the preceding sentence, or in any other provision of law, shall be construed to require the disclosure of standards used or to be used for the selection of returns for examination, or data used or to be used for determining such standards, if the Secretary determines that such disclosure will seriously impair assessment, collection, or enforcement under the internal revenue laws.

(3) * * * *

(k) Disclosure of certain returns and return information for tax administration purposes.

* * * *

(6) **Disclosure by internal revenue officers and employees for investigative purposes.** An internal revenue officer or employee may, in connection with his official duties relating to any audit, collection activity, or civil or criminal tax investigation or any other offense under the internal revenue laws, disclose return information to the extent that such disclosure is necessary in obtaining information, which is not otherwise reasonably available, with respect to the

correct determination of tax, liability for tax, or the amount to be collected or with respect to the enforcement of any other provision of this title. Such disclosures shall be made only in such situations and under such conditions as the Secretary may prescribe by regulation.

-:-:-:

tered mail to each spouse at his last known address.

(3) Estate tax. * * * *

-:-:-:

-:-:-:

judgment lien creditor until notice thereof which meets the requirements of subsection (f) has been filed by the Secretary.

* * * *

(f) Place for filing notice; form.

(1) Place for filing. The notice referred to in subsection (a) shall be filed–

(A) Under state laws.

(i) Real property. In the case of real property, in one office within the State (or the county, or other governmental subdivision), as designated by the laws of such State, in which the property subject to the lien is situated; and

(ii) Personal property. In the case of personal property, whether tangible or intangible, in one office within the State (or the county, or other governmental subdivision) as designated by the laws of such State, in which the property subject to the lien is situated, except that State law merely conforming to or reenacting Federal law establishing a national filing system does not constitute a second office for filing as designated by the laws of such State; or

(B) With the clerk of district court. In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State has not by law designated one office which meets the requirements of subparagraph (A); or

(C) With recorder of deeds of the District of Columbia. In the office of the Recorder of Deeds

of the District of Columbia, if the property subject to the lien is situated in the District of Columbia.

-:-

§ 6331. Levy and distraint.

(a) Authority of Secretary. If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the district of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401(d)) of such officer, employee, or elected official. If the Secretary makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

(b) Seizure and sale of property.

* * * *

(d) Requirement of notice before levy.

(1) In general. Levy may be made under subsection (a) upon the salary or wages or other property of any person with respect to any unpaid tax only after the Secretary has notified such person in writing of his

intention to make such levy.

(2) **30-day requirement.** The notice required under paragraph (1) shall be—

(A) given in person,

(B) left at the dwelling or usual place of business of such person, or

(C) sent by certified or registered mail to such person's last known address,

no less than 30 days before the day of the levy.

* * * *

(f) Uneconomical levy. No levy may be made on any property if the amount of the expenses which the Secretary estimates (at the time of levy) would be incurred by the Secretary with respect to the levy and sale of such property exceeds the fair market value of such property at the time of levy.

(g) * * * *

-:-:-:

(b) No liability for good faith but erroneous interpretation. No liability shall arise under this section with respect to any disclosure which results from a good faith, but erroneous, interpretation of section 6103.

(c) Damages. In any action brought under subsection (a), upon a finding of liability on the part of the defendant, the defendant shall be liable to the plaintiff in an amount equal to the sum of—

(1) the greater of—

(A) $1,000 for each act of unauthorized disclosure of a return or return information with respect to which such defendant is found liable, or

(B) the sum of—

(i) the actual damages sustained by the plaintiff as a result of such unauthorized disclosure, plus

(ii) in the case of a willful disclosure or a disclosure which is the result of gross negligence, punitive damages, plus

(2) the costs of the action.

* * * *

-:-:-:

provided in section 7432, such civil action shall be the exclusive remedy for recovering damages resulting from such actions.

(b) Damages. In any action brought under subsection (a), upon a finding of liability on the part of the defendant, the defendant shall be liable to the plaintiff in an amount equal to the lesser of $100,000 or the sum of–

(1) actual, direct economic damages sustained by the plaintiff as a proximate result of the reckless or intentional actions of the officer or employee, and

(2) the costs of the action.

* * *

(d) Limitations.

(1) **Requirement that administrative remedies be exhausted.** A judgment for damages shall not be awarded under subsection (b) unless the court determines that the plaintiff has exhausted the administrative remedies available to such plaintiff within the Internal Revenue Service.

(2) **Mitigation of damages.** The amount of damages awarded under subsection (b)(1) shall be reduced by the amount of such damages which could have reasonably been mitigated by the plaintiff.

(3) **Period for bringing action.** Notwithstanding any other provision of law, an action to enforce liability created under this section may be brought without regard to the amount in controversy and may be brought only within 2 years after the date the right of action accrues.

IV. PLAINTIFF'S ISSUES OF FACT

1. Which, if any, of the disclosures resulted from a good-faith, but erroneous, interpretation of 26 U.S.C. 6103 (and what were the interpretations, and what was erroneous about them)?

2. Prior to the disclosures, did Defendant have Plaintiff's correct address in its computer under Plaintiff's wife's social security number?

3. Was return information disclosed to "Jerry" on March 23, 1989?

4. Were the postal tracers filled out on forms containing a pre-signed "certification" of "Carol M. Fay" as District Director?

5. Was Plaintiff's correct address obtained when Defendant did the computer search by which the levy sources of Macklanburg-Duncan and Liberty National Bank & Trust were obtained?

V. PLAINTIFF'S ISSUES OF LAW

1. Can a lien for an alleged deficiency in income taxes arise when a Citizen has received no notice or demand, and has had no opportunity to neglect or refuse to pay, nor any opportunity to petition Tax Court?

2. Did a lien for 1983 income taxes arise against Plaintiff in 1988?

3. Is a notice of lien authorized when no lien has arisen?

4. Is a notice of levy authorized when the taxpayer has received neither notice of deficiency, nor notice of assessment and demand to pay, nor a notice of intent to levy, and has had no opportunity to neglect or refuse to pay, or even to petition the Tax Court?

5. When prior notices, including notices sent by certified mail, have all been returned as undeliverable by the Post Office, does that serve as notice to the IRS that the taxpayer has moved?

6. When the name and social security number of each spouse are shown on an income tax return, and the couple moves, and subsequent tax returns are filed by the spouse, showing the new address, which address is the "last known address"?

7. When the document used for the "last known address" is a joint tax return, and two payments for that return have been made by the spouse, with letters indicating a new address, and the IRS has mailed a letter regarding the payment to the new address, and the same spouse has filed three tax returns as "married filing separately" showing the new address, and the IRS has mailed three refund checks to the new address, and the IRS has mailed a Form 1040 with a pre-printed address label containing the new address, while all mail sent to the address shown on the joint return has been returned by the post office as undeliverable, which address should be considered as the "last known address"?

8. When the IRS has been notified that a taxpayer has moved, does the IRS have a duty to exercise reasonable care and due diligence in ascertaining the new address?

9. When the IRS is aware that a taxpayer has moved, does reasonable care include performing a computer search for the social security numbers of both spouses listed on the previous return?

10. When a computer search is done and reveals a new address for the spouse, and where there is no evidence that the spouses have separated, does reasonable care include checking the new address shown for the spouse?

11. When a taxpayer files a subsequent return, with a new

address, does that constitute notice of change of address?

12. When a couple, after filing a joint return, moves, and the IRS knows that the couple has moved, and the IRS knows the new address of the spouse who was shown on the joint return, and the IRS has been given no reason to believe that the couple are separated, is the IRS justified in sending a series of statutorily-required notices for the husband to the old address, ignoring the new address shown for the wife, though each notice is returned by the post office as undeliverable?

13. Is the requirement at 26 U.S.C. 6212(a) and (b) to send the notice of deficiency by certified mail or registered mail to the "last known address" satisfied when the notice is mailed to an address from which previous notices have been returned by the post office as undeliverable, and the notice of deficiency also is returned by the post office as undeliverable?

14. Is the requirement at 26 U.S.C. 6303(a) to leave the notice of assessment at the dwelling or usual place of business, or mail it to the "last known address," satisfied when the notice is mailed to an address from which all previous notices, including the notice of deficiency, have been returned as undeliverable, and the notice of assessment itself is returned by the post office as undeliverable?

15. When the IRS determines the correct address, and knows that no notice or demand has been received by the addressee, are the statutory due process requirements satisfied by service of a final notice only, with no notice of deficiency, and thus no "ticket" to the Tax Court?

16. Can an alleged deficiency assessment be valid when it is made prior to actual notice of deficiency or opportunity to petition the Tax Court?

17. Is the IRS authorized to disclose return information

to the post office, using an Address Information Form containing a certification by the IRS district director that the information is required for the performance of official duties of the IRS?

18. Is a certification legal when the signature was superimposed on a blank form, and the form was duplicated with the superimposed signature thereon, prior to the data to be certified being placed thereon by another individual?

19. Does the superimposed facsimile of a signature on a blank Address Information Request form, beneath a statement certifying that information not yet contained on that blank form is required for the performance of official duties, constitute legal certification regarding data filled in later by a different individual?

20. Are IRS agents authorized to knowingly or negligently make false statements in a Notice of Federal Tax Lien?

21. Can the requirement of Treasury Regulation 301.6203-1 for supporting records for the Summary Record of Assessments be satisfied by a document that will not exist until more than three years later?

22. Is an assessment procedurally valid when it is not recorded in the manner prescribed by law?

23. Does a notice of lien require a valid underlying assessment?

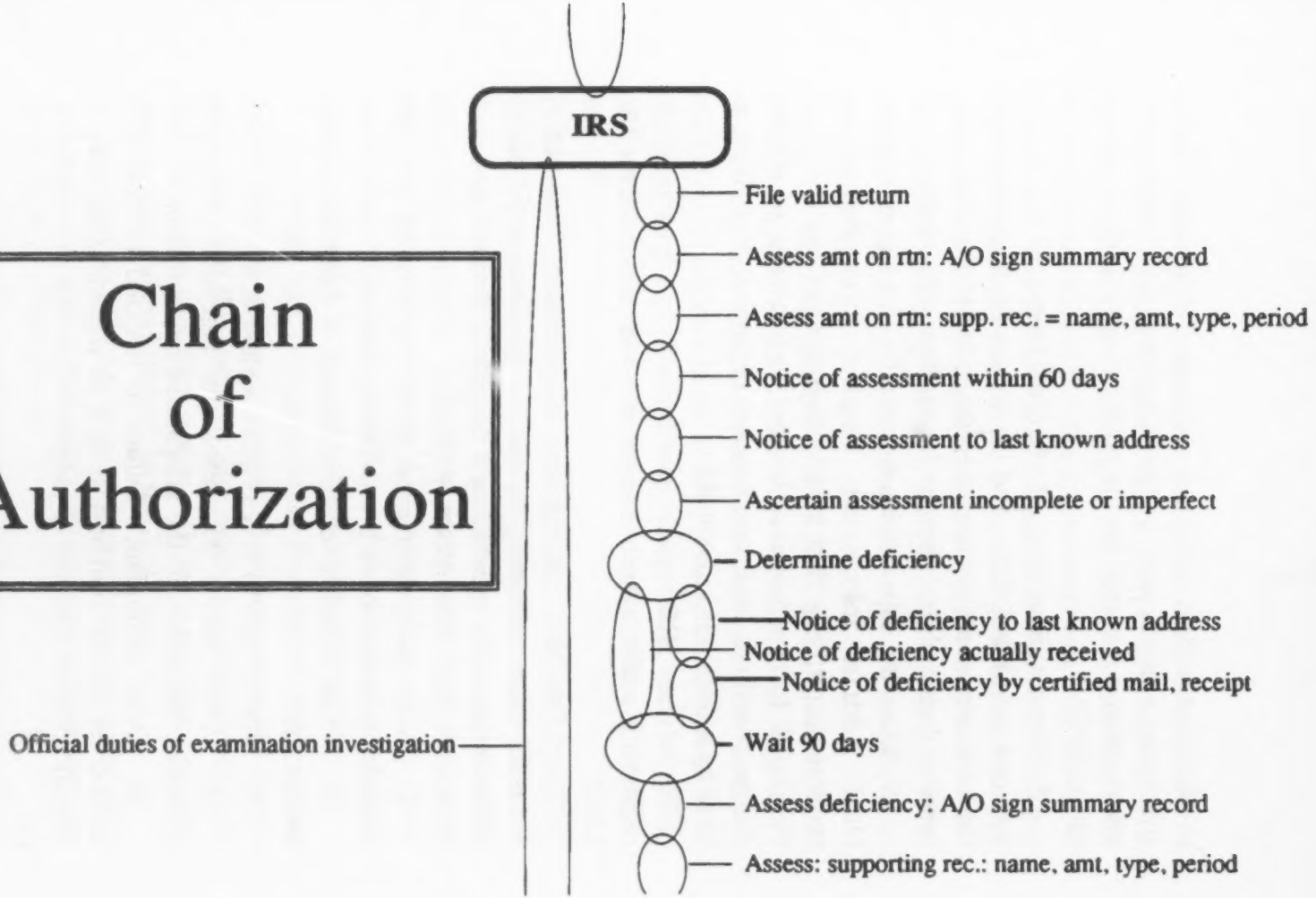
24. Does notice of levy require a valid lien?

25. Does failure to answer an amended complaint constitute admission of the allegations made therein?

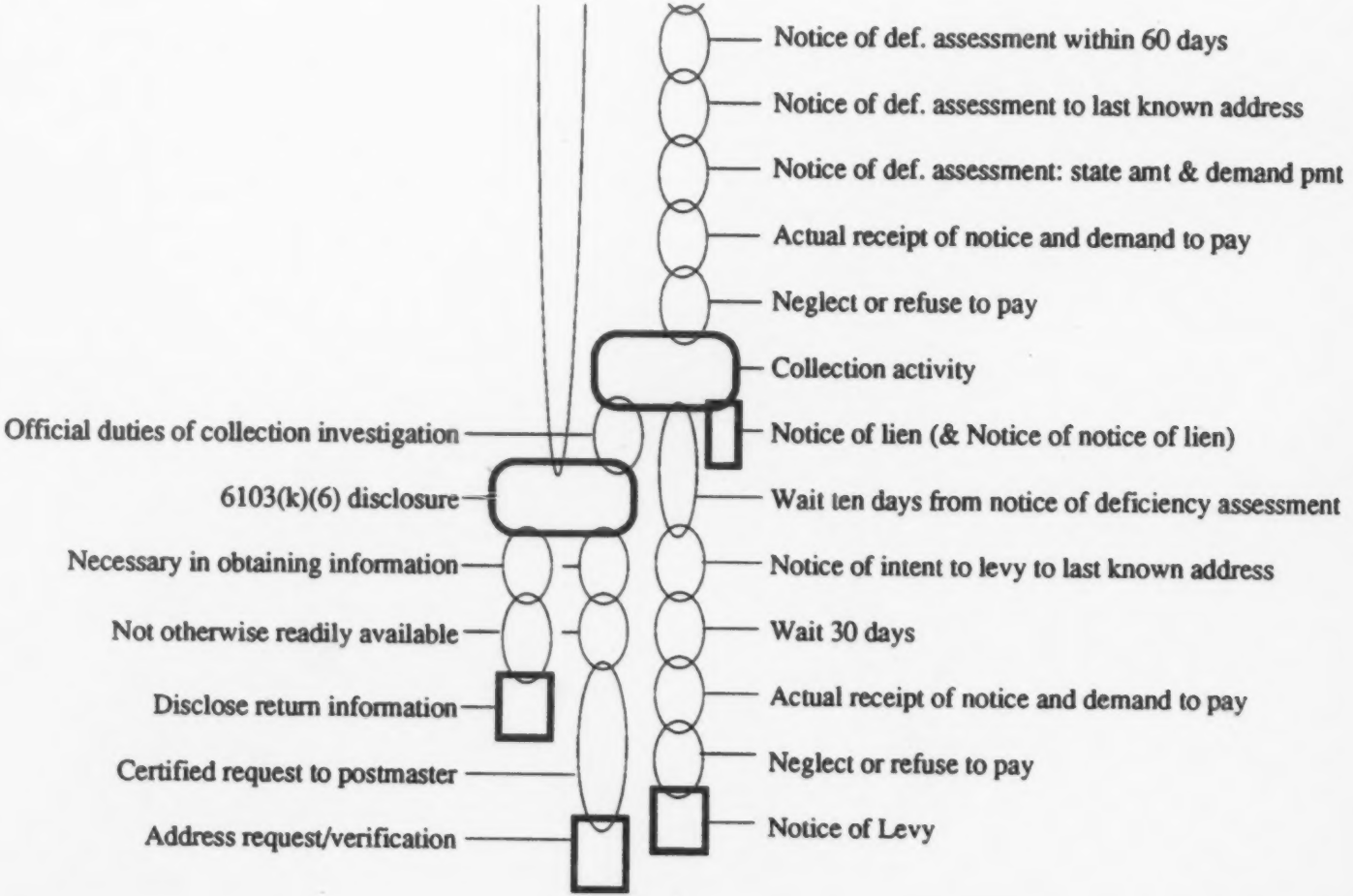
26. Does Defendant's failure to respond to Plaintiff's motion for partial summary judgment regarding sufficiency of notice entitle Plaintiff to judgment thereon as a matter of law?

Appendix I.1

Chain of Authorization


IRS
File valid return
Assess amt on rtn: A/O sign summary record
Assess amt on rtn: supp. rec. = name, amt, type, period
Notice of assessment within 60 days
Notice of assessment to last known address
Ascertain assessment incomplete or imperfect
Determine deficiency
Notice of deficiency to last known address
Notice of deficiency actually received
Notice of deficiency by certified mail, receipt
Official duties of examination investigation
Wait 90 days
Assess deficiency: A/O sign summary record
Assess: supporting rec.: name, amt, type, period

Appendix I.2


Notice of def. assessment within 60 days
Notice of def. assessment to last known address
Notice of def. assessment: state amt & demand pmt
Actual receipt of notice and demand to pay
Neglect or refuse to pay
Collection activity
Notice of lien (& Notice of notice of lien)
Wait ten days from notice of deficiency assessment
Notice of intent to levy to last known address
Wait 30 days
Actual receipt of notice and demand to pay
Neglect or refuse to pay
Notice of Levy
Official duties of collection investigation
6103(k)(6) disclosure
Necessary in obtaining information
Not otherwise readily available
Disclose return information
Certified request to postmaster
Address request/verification

(2)

Supreme Court, U.S.
FILED
MAR 2 0 1995
OFFICE OF THE CLERK

No. 94-1216

In the Supreme Court of the United States

OCTOBER TERM, 1994

J. CHARLES GILLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

LORETTA C. ARGRETT
Assistant Attorney General

JONATHAN S. COHEN
MARY FRANCES CLARK
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

16 pp

QUESTION PRESENTED

Whether the notice of deficiency in petitioner's 1983 income taxes was sent to his "last known address" within the meaning of Section 6212(b)(1) of the Internal Revenue Code, 26 U.S.C. 6212(b)(1).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	6
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Armstrong v. *Commissioner*, 15 F.3d 970 (10th Cir. 1994)	7, 9
Berger v. *Commissioner*, 404 F.2d 668 (3d Cir. 1968), cert. denied, 395 U.S. 905 (1969)	9
Cohen v. *United States*, 297 F.2d 760 (9th Cir.), cert. denied, 369 U.S. 865 (1962)	11
Cyclone Drilling, Inc. v. *Kelley*, 769 F.2d 662 (10th Cir. 1985)	8
Farr v. *United States*, 990 F.2d 455 (9th Cir.), cert. denied, 114 S. Ct. 634 (1993)	6
Guillen v. *Barnes*, 819 F.2d 975 (10th Cir. 1987)	7
Herb v. *Pitcairn*, 324 U.S. 117 (1945)	11
Keado v. *United States*, 853 F.2d 1209 (5th Cir. 1988)	10-11
King v. *Commissioner*, 857 F.2d 676 (9th Cir. 1988)	7, 9
Marks v. *Commissioner*, 947 F.2d 983 (D.C. Cir. 1991)	9
McPartlin v. *Commissioner*, 653 F.2d 1185 (7th Cir. 1981)	10
Mulder v. *Commissioner*, 855 F.2d 208 (5th Cir. 1988)	9, 10
Phillips v. *Commissioner*, 283 U.S. 589 (1931)	12
Pomeroy v. *United States*, 864 F.2d 1191 (5th Cir. 1989)	7, 9, 10
Powell v. *Commissioner*, 958 F.2d 53 (4th Cir.), cert. denied, 113 S. Ct. 440 (1992)	9, 10
Rappaport v. *United States*, 583 F.2d 298 (7th Cir. 1978)	11

Cases—Continued:

Page

United States v. *Zolla*, 724 F.2d 808 (9th Cir.), cert. denied, 469 U.S. 830 (1984) 7
Venen v. *United States*, 38 F.3d 100 (3d Cir. 1994) 6
Williams v. *Commissioner*, 935 F.2d 1066 (9th Cir. 1991) 9

Statutes:

Internal Revenue Code (26 U.S.C.):
§ 6103 ..... 2, 4
§ 6212 ..... 3, 10
§ 6212(a) 2. 3
§ 6212(b) 7
§ 6212(b)(1) 3, 5, 6, 7, 10, 11
§ 6213 7
§ 6532(a) 12
§ 7422(a) 12
§ 7431 ..... 2, 3, 4, 6, 11
§ 7431(a) 2
§ 7431(b) 2
§ 7431(c) 2, 12
Revenue Act of 1924, ch. 234, § 274(a), 43 Stat. 297 7
28 U.S.C. 1346(a)(1) 12

Miscellaneous:

65 Cong. Rec. 2969-2970 (1924) 7
J. Seidman, *Legislative History of Federal Income Tax Laws, 1938-1961* (1938) 7

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1216

J. CHARLES GILLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A5) is reported at 33 F.3d 46. The opinion of the district court (Pet. App. B1-B16) is reported at 838 F. Supp. 521.

JURISDICTION

The judgment of the court of appeals was entered on August 17, 1994. A petition for rehearing was denied on October 24, 1994 (Pet. App. E1). The petition for a writ of certiorari was filed on January 13, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves a suit against the United States seeking damages under Section 7431 of the Internal

Revenue Code. That statute authorizes a suit for damages against the United States for the knowing or negligent disclosure of a taxpayer's "return or return information * * * in violation of any provision of [S]ection 6103 [of the Code.]" 26 U.S.C. 7431(a).[1] Petitioner contends that the Internal Revenue Service violated Section 6103 by disclosing his tax "return information" in connection with efforts made by the IRS to locate petitioner and to collect the income tax liability assessed against him for 1983.

1. Petitioner did not file an income tax return for 1983. A statutory notice of deficiency for his 1983 taxes was sent to petitioner on December 31, 1987, pursuant to Section 6212(a) of the Code. The notice was mailed to the Orem, Utah address that appeared on petitioner's return for 1982, the last year for which he had filed a return. Sometime after 1982, however, petitioner and his wife had moved from Utah to Oklahoma City, Oklahoma. Petitioner did not notify the IRS of his new address and filed no income tax returns during this period (Pet. App. A2, A3, B1, B2, B6).

Although petitioner had thus "dropped out" of the federal income tax system, his wife separately communicated with the IRS in May 1985, through an attorney, seeking to pay the joint income tax liability of petitioner and herself for 1982. The letter from her attorney informed the IRS that she did "not wish to involve her husband in her efforts to resolve this matter" (Pet. App.

---

[1] 26 U.S.C. 7431(b) further specifies, however, that there shall be no liability in the case of "disclosure which results from a good faith, but erroneous, interpretation of [S]ection 6103." Under 26 U.S.C. 7431(c), a successful plaintiff may recover costs, actual damages, punitive damages in the case of willful or grossly negligent disclosures, and a minimum damage award of $1,000 for each act of unauthorized disclosure.

B2). For years after 1982, petitioner's wife filed "married but filing separately" income tax returns under her maiden name. Her separate returns reflected an Oklahoma address but did not mention petitioner by name, address or social security number (Pet. App. A3).

The notice of deficiency for petitioner's 1983 taxes, which was mailed to petitioner in 1987, was returned to the IRS undelivered. In 1988 and 1989, the IRS attempted to locate petitioner to collect his 1983 income tax liability and served various levies and filed notices of tax liens. In 1989, a revenue officer attempted to determine petitioner's current address by visiting the Orem, Utah, address listed on petitioner's 1982 tax return. The IRS also sent three postal tracers to the post office. Eventually, in April 1989, the IRS succeeded in discovering petitioner's then-current address in Broken Arrow, Oklahoma (Pet. App. A3).

2. In response to these tax collection efforts, petitioner filed this suit for damages under 26 U.S.C. 7431. Petitioner alleged that the IRS had wrongfully disclosed his tax return information under the following theory: (i) He contended that the notice of deficiency had not been sent to his last known address as required by Section 6212(b)(1) of the Code;[2] (ii) he asserted, as a

---

[2] 26 U.S.C. 6212 provides in relevant part:

(a) In general.

If the Secretary determines that there is a deficiency in respect of any tax imposed by subtitle A or B or chapter 41, 42, 43, or 44, he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.

(b) Address for Notice of Deficiency—

(1) Income and gift taxes and certain excise taxes

In the absence of notice to the Secretary under section 6903 of the existence of a fiduciary relationship, notice of a

consequence, that the tax assessment made against him was invalid; (iii) assuming the assessment to be invalid, he contended that the IRS activities to collect that assessment were unauthorized; and (iv) assuming that the collection activities were unauthorized, he claimed that the disclosure of "return information" incident to those collection activities violated Section 6103 and therefore gave rise to a claim for damages under Section 7431 (Pet. App. A3, B5-B7).

Following a bench trial, the district court awarded petitioner $16,000 in damages under 26 U.S.C. 7431. The court concluded that the underlying assessment was invalid—and the subsequent collection efforts were therefore unauthorized—because the IRS had failed to send petitioner a notice of deficiency at his last known address. The court held that, notwithstanding petitioner's failure to provide the IRS with notice of his new address, the IRS had not exercised due diligence in ascertaining petitioner's correct address. The court stated that the IRS should have taken additional measures to find petitioner, such as by cross-referencing to the files showing the current location of petitioner's wife (Pet. App. A3-A4, B11-B12). For these reasons, the court held that the disclosures of tax information made by the IRS in the course of its efforts to locate petitioner and collect his outstanding taxes were unauthorized.

---

deficiency in respect of a tax imposed by subtitle A, chapter 12, chapter 41, chapter 42, chapter 43, or chapter 44 if mailed to the taxpayer at his last known address, shall be sufficient for purposes of subtitle A, chapter 12, chapter 41, chapter 42, chapter 43, chapter 44, and this chapter even if such taxpayer is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence.

* * * * *

The district court found 13 instances of unauthorized disclosure: two notices of federal tax lien filed against petitioner in Utah County, Utah, and Tulsa County, Oklahoma; eight notices of levy issued to banks and various other entities; two inquiries concerning petitioner's current address, made to the resident of the Orem, Utah address specified on petitioner's 1982 return and to the next-door neighbor; and a disclosure of petitioner's name and other return information to an individual at a former employer of petitioner. The court imposed minimum statutory damages of $1,000 for each of these instances of disclosure (Pet. App. B15-B16). In a subsequent order and judgment, the district court identified three additional unauthorized disclosures in the form of "postal tracers" that had been sent by the IRS to obtain petitioner's current address. The court awarded petitioner an additional $3,000 in damages for these disclosures (*id.* at C1-C3).

3. The court of appeals reversed (Pet. App. A1-A5). The court held that the challenged tax collection activities were not unauthorized because the IRS had mailed the notice of deficiency to petitioner at his last known address within the meaning of 26 U.S.C. 6212(b)(1). The court emphasized that, in issuing a notice of deficiency to a taxpayer's last known address, the IRS is entitled to rely on the address shown on the taxpayer's most recent return unless the taxpayer has provided the IRS with clear notice of a new address (Pet. App. A4-A5). Since it was undisputed that petitioner never notified the IRS that he had moved, the statutory notice of deficiency mailed to the address shown on petitioner's return for 1982—the last return he filed—complied with the statutory requirement that it be sent to his "last known address."

The court emphasized that, while the IRS must use "reasonable diligence in ascertaining a taxpayer's address," it is nevertheless entitled to rely on the return documents submitted by the taxpayer (Pet. App. A4). The court rejected the district court's conclusion that the IRS should have cross-referenced to file data concerning petitioner's wife, stating that her correspondence with the IRS was "not tantamount to notice from taxpayer that he had also moved" (*id.* at A4-A5). The court concluded that a taxpayer "who did not bother to file a tax return after 1982, will not now be heard to complain that the IRS was not adequately diligent in its efforts to track him down" (*ibid.*).

The court of appeals also concluded that the fact that the notice of deficiency sent to petitioner's Utah address had been returned to the IRS as undeliverable did not make that notice ineffective. The court pointed out that, under 26 U.S.C. 6212(b)(1), the notice of deficiency is valid irrespective of receipt if it is sent to a taxpayer's last known address (Pet. App. A4-A5). [3]

ARGUMENT

The court of appeals correctly held that, in the absence of any notice of a new address provided by petitioner to the IRS, the address shown by petitioner on the last tax

---

[3] The court of appeals did not find it necessary to reach the additional arguments advanced by the government as independent grounds for reversing the decision of the district court. The court thus did not address whether Section 7431 provides a damage remedy for disclosures of tax information incident to collection activities undertaken in good faith but pursuant to a technically defective underlying assessment. See, *e.g.*, *Venen* v. *United States*, 38 F.3d 100, 104-107 (3d Cir. 1994); *Farr* v. *United States*, 990 F.2d 455, 457 (9th Cir.), cert. denied, 114 S. Ct. 554 (1993); note 1, *supra*.

return he had filed was his "last known address" for purposes of the statutory notice of deficiency. For that reason, as well as for the additional reasons not reached by the court of appeals (note 3, *supra*), the tax collection procedures undertaken by the IRS did not constitute "unauthorized disclosures" of return information.

1. Under Section 6213 of the Internal Revenue Code, a deficiency in federal income tax generally may not be assessed or collected until notice of the deficiency has been sent to the taxpayer. Under Section 6212, the Commissioner is authorized to give notice by mailing a "notice of deficiency" to the taxpayer's "last known address." 26 U.S.C. 6212(b)(1). Actual receipt of the notice is not required. Instead, Section 6212(b) explicitly provides that the notice "shall be sufficient" if mailed to the taxpayer at his last known address. See *Guillen* v. *Barnes*, 819 F.2d 975, 977 (10th Cir. 1987); *King* v. *Commissioner*, 857 F.2d 676, 681 (9th Cir. 1988). [4] While the IRS is to use "reasonable diligence" in ascertaining a taxpayer's address before mailing the notice, the agency is entitled to rely on the address shown on a taxpayer's most recent return as the taxpayer's last known address unless the taxpayer has provided clear and concise notice of a new address. See, *e.g.*, *Armstrong* v. *Commissioner*, 15 F.3d 970, 974 (10th Cir. 1994); *Pomeroy* v. *United States*, 864 F.2d 1191, 1195 (5th Cir. 1989); *King* v. *Commissioner*, 857 F.2d at 679-681; *United States* v. *Zolla*, 724 F.2d 808, 810 (9th Cir.), cert. denied, 469 U.S. 830 (1984).

---

[4] Congress considered and rejected a proposal that would have required actual receipt of the notice. See Revenue Act of 1924, ch. 234, § 274(a), 43 Stat. 297; 65 Cong. Rec. 2969-2670 (1924) (proposed amendment by Rep. Allen); J. Seidman, *Legislative History of Federal Income Tax Laws, 1938-1861*, at 759-761 (1938).

In this case, the IRS mailed the deficiency notice for 1983 to the address shown on petitioner's most recent return at that time, which was his 1982 return. As the court of appeals observed (Pet. App. A5), petitioner "did not bother to file a tax return" for subsequent years and moved three times—from Utah to Oklahoma City, then to a new residence in Oklahoma City, and ultimately to Broken Arrow—without providing notification of any of his changed addresses to the IRS. In these circumstances, the court of appeals correctly held that the notice of deficiency was properly sent to petitioner's last known address.

Petitioner suggests (Pet. 17-18) that, if the IRS had employed greater efforts, it might have been possible to track him down. But petitioner also does not dispute that he totally failed to advise the IRS of his new addresses. Under the settled authority on which petitioner himself relies (Pet. 15), when the taxpayer has not provided " 'clear and concise' notice of his current address to the IRS," the agency is entitled to rely on the address reflected on the taxpayer's most recent return. *Cyclone Drilling, Inc.* v. *Kelley*, 769 F.2d 662, 664 (10th Cir. 1985). The decision in this case is a direct application of that basic principle.

2. Petitioner asserts that the holding in this case improperly permits the IRS to "ignore clear evidence that a taxpayer has moved" (Pet. 19). That contention misses the point. The fact that the IRS is aware that a taxpayer has moved does not disable it from providing the notice required by the statute. By providing that valid notice may be sent to the *last known* address of the taxpayer, Congress plainly contemplated that notice may be sent to that location even when the *current* location of the taxpayer is no longer "known." Courts have thus correctly and consistently held that "notice mailed to

the last known address is sufficient even if it is never received." *King* v. *Commissioner*, 857 F.2d at 681.

Whether the evidence in this case reflects a sufficient degree of diligence in the Service's efforts to determine the address of the taxpayer before the notice was sent is, in any event, an inherently factual question. That factual question does not warrant further review.

3. There is general agreement among the courts of appeals that information acquired *after* the statutory notice is sent does not affect the validity of the notice, for the inquiry under the statute focusses "on the information available to the IRS *at the time it issued the notice of deficiency*." *Pomeroy* v. *United States*, 864 F. 2d at 1195, quoting *Mulder* v. *Commissioner*, 855 F.2d 208, 211 (5th Cir. 1988). See also *Williams* v. *Commissioner*, 935 F.2d 1066, 1067-1068 (9th Cir. 1991). "Nothing in the statute suggests that the IRS is obligated to take additional steps to effectuate delivery if the notice is returned; indeed, a notice mailed to the last known address is sufficient even if it is never received." *King* v. *Commissioner*, 857 F.2d at 681.

Petitioner is correct, however, in noting (Pet. 19) that the analysis applied by the Fourth Circuit in *Powell* v. *Commissioner*, 958 F.2d 53, cert. denied, 113 S. Ct. 440 (1992), is difficult to reconcile with the general view.[5] In

---

[5] Petitioner errs in suggesting (Pet. 19-20) that other decisions reflect a conflict on this issue. For example, in *Berger* v. *Commissioner*, 404 F.2d 668 (3d Cir. 1968), cert. denied, 395 U.S. 905 (1969); *Armstrong* v. *Commissioner*, 15 F.3d 970 (10th Cir. 1994), and *Marks* v. *Commissioner*, 947 F.2d 983 (D.C. Cir. 1991), the courts of appeals upheld the validity of statutory notices because the taxpayers in those cases—like petitioner—had failed to provide clear and concise notice of a correct address to the Commissioner. In *Mulder* v. *Commissioner*, 855 F.2d at 212, the court concluded that, when letters to the taxpayer had been

Powell, the court held that the IRS has a duty of "diligence" to investigate and attempt redelivery when a notice of deficiency that is sent to the taxpayer's "last known address" is thereafter returned undelivered. 958 F.2d at 55-57. That aspect of the court's decision in *Powell* is contradicted (i) by the numerous decisions holding that the statutory inquiry focusses on the information available at the time the notice is mailed (*e.g.*, *Pomeroy* v. *United States*, 864 F.2d at 1195) and (ii) by the language of the statute, which provides that a notice that is "mailed" to the "last known address" is "sufficient" (26 U.S.C. 6212(b)(1)). [6]

---

returned undelivered before the IRS issued the notice of deficiency to the same address, the agency should have contacted the tax return preparer—whose name and address were shown on the taxpayer's return (*id.* at 210)—to determine the taxpayer's current address. The *Mulder* court did not hold that information gained *after* the notice of deficiency is mailed is relevant in determining the sufficiency of the notice; indeed, the court stated to the contrary that the taxpayer's "last known address" under Section 6212 is to be determined from "the information available to the IRS at the time it issued the notice of deficiency." 855 F.2d at 211.

[6] *McPartlin* v. *Commissioner*, 653 F.2d 1185 (7th Cir. 1981), which petitioner cites (Pet. 20), does not conflict with the majority view. In that case, the court determined that the IRS had *not* sent the notice to the taxpayer's current address as reflected in the agency's own records. See 653 F.2d at 1187, 1190. In *McPartlin*, the IRS had specific knowledge of the taxpayer's change of address due to an ongoing criminal investigation. See *ibid.* The record in *McPartlin* thus established to the court's satisfaction that the notice of deficiency was not "mailed to the taxpayer at his last known address." The court went on in *McPartlin* to observe that, if the IRS was aware that the notice had not been delivered by the Postal Service, this would also be an indication that the notice was inadequate. As other courts have observed, however, that portion of the *McPartlin* opinion was dicta. *Keado* v. *United States*, 853

Nothing has occurred since this Court denied the government's petition for certiorari in *Powell* to make the conflict created by that decision a problem of greater magnitude. Other circuits have not been persuaded by *Powell* to reject the general rule. Moreover, the facts of this case provide little warrant for review of the *Powell* issue. Since petitioner failed to file tax returns and moved several times without providing any information concerning his change of address to the IRS, it is purely speculative whether a different judgment would result even if the different legal test enunciated in *Powell* were applied.

Moreover, as noted above, even if the notice of deficiency that was mailed to petitioner's last known address in Utah did not satisfy the "last known address" requirement of Section 6212(b)(1), there are substantial other reasons—which the court of appeals had no occasion to consider—to reject petitioner's claim for damages under Section 7431. See note 3, *supra*. Further review in this case is thus not warranted for the additional reason that a judgment of this Court on the question decided below would be unlikely to alter the ultimate disposition of this controversy.[7] Cf. *Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945).

F.2d 1209, 1212 n.9 (5th Cir. 1988). In expressing that view, moreover, the *McPartlin* court did not consider or purport to reject its prior holding in *Rappaport* v. *United States*, 583 F.2d 298, 301 (7th Cir. 1978), that the statute "is satisfied by mailing notice to taxpayer's last known address whether or not actual notice is ever received" (*ibid.*, citing, *e.g.*, *Cohen* v. *United States*, 297 F.2d 760 (9th Cir.), cert. denied, 369 U.S. 865 (1962)).

[7] Petitioner also contends (Pet. 21-22) that he has been denied due process of law because he has no access to the Tax Court at this time for review of the notice of deficiency. That claim overlooks the fact that petitioner may still contest the lawfulness of the

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

LORETTA C. ARGRETT
Assistant Attorney General

JONATHAN S. COHEN
MARY FRANCES CLARK
Attorneys

MARCH 1995

---

claimed deficiency by paying the tax, filing an administrative claim and, if his claim is denied or not ruled on within 6 months, bringing a suit for refund. See 26 U.S.C. 6532(a), 7422(a); 28 U.S.C. 1346(a)(1); *Phillips* v. *Commissioner*, 283 U.S. 589 (1931).

Petitioner further argues (Pet. 22-25) that certiorari should be granted because the court of appeals reversed the district court's judgment instead of remanding the case for additional findings of fact and conclusions of law. Petitioner, however, did not urge such a remand in the court of appeals, either in his brief or, after the court's decision, in his petition for rehearing. Because this contention was not raised below, it does not afford a proper basis for further review. Moreover, the holding of the court of appeals—that the notice of deficiency was sent to petitioner's last known address—would foreclose similar challenges to the propriety of subsequent notices of intent to levy. Petitioner did not provide a notification to the IRS of his new address in advance of any of these statutory notices from the agency.

Supreme Court, U.S.
FILED
APR 10 1995
OFFICE OF THE CLERK

No. 94-1216

In The Supreme Court of the United States

OCTOBER TERM, 1994

J. CHARLES F. GILLE, *Petitioner,*

v.

UNITED STATES OF AMERICA.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PLAINTIFF'S REPLY TO BRIEF IN OPPOSITION

J. CHARLES F. GILLE, *pro se*
1700 W. Quantico Street
Broken Arrow, Okla. 74011
(918) 455-5968

APRIL 1995

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT 1

ARGUMENT 2

1. Gille effectively gave the IRS sufficient notice of his new address, as evidenced by the IRS collecting over $5,000 from the new address as a result of a change of address Gille filed with the post office. 2

2. Awareness of a move does not prevent the IRS from sending notice to the correct address. 3

3. Notice may be sufficient though never received, but only if truly sent to the last known address. . 4

4. The factual issue of diligence was determined in Petitioner's favor. 5

5. When the IRS issued the notice of deficiency, it was already aware that the Gilles had moved, and had the new address in its computer. 5

6. Availability of post-payment suit for refund does not justify deprivation of pre-payment privilege. . 6

7. This Court may instruct the court of appeals to remand. 7

8. A holding on the last known address for the notice of deficiency does not foreclose challenges regarding the last known address for other notices. 7

9. The argument regarding other grounds considered by a lower court applies more to Gille than to the Government. 8

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES

Guillen v. Barnes, 819 F.2d 975 (10th Cir.1987) 5

Holof v. Commissioner, 872 F.2d 50 (3rd Cir. 1989) . . . 5

King v. Commissioner, 857 F.2d 676 (9th Cir.1988) . . . 4

Shapiro v. Secretary of State, 499 F.2d 527 (162 U.S.App.D.C. 391)(1975) 8

No. 94-1216

In The Supreme Court of the United States

OCTOBER TERM, 1994

J. CHARLES F. GILLE, *Petitioner,*

v.

UNITED STATES OF AMERICA.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PLAINTIFF'S REPLY TO BRIEF IN OPPOSITION

STATEMENT

The brief in opposition raises for the first time the following arguments:

1) Petitioner totally failed to advise the IRS of his new addresses (Opp. 8).

2) The IRS must be allowed to send its notices without regard to whether they will be received (Opp. 8).

3) Notice is sufficient even if never received (Opp. 9).

4) The issue of diligence with regard to the last known address is not open to further review (Opp. 9).

5) Information acquired after the notice of deficiency is sent does not affect validity of the notice (Opp. 10).

6) Access to Tax Court is not a right, since an unlawful collection can be challenged in District Court after paying the taxes (Opp. 11).

7) Remand cannot be suggested now since it was not requested earlier (Opp. 12).

8) The holding of the court of appeals the last known address for the notice of deficiency settled the issue of last known address for all notices (Opp. 12).

9) Even if it decided wrongly on the last known address, the court of appeals could also have reversed on the grounds that the IRS acted in good faith (Opp. 6,7).

Not one of these arguments has merit. We will address each in turn.

ARGUMENT

1. Gille effectively gave the IRS sufficient notice of his new address, as evidenced by the IRS collecting over $5,000 from the new address as a result of a change of address Gille filed with the post office.

The address used by the IRS for the last known address in this case was the address on the Gilles' joint return for 1982. However, prior to any of the activity at issue in this case, the address for that return had already been established with the IRS as the Gilles' new address in Oklahoma, and

the IRS had collected an additional $5,131.10 from this address in regard to this 1982 joint return.

Pursuant to a change of address the Gilles filed with the postal service, a notice of deficiency for this 1982 return was forwarded to the Gilles' new address in Oklahoma in January, 1985 (Pet.App. B.1). As a result of correspondence between this address and the IRS, regarding this joint return, the IRS collected the deficiency plus penalties and interest ($4,982.48 at Pet.App. B.2, plus $139.62 paid on 7/11/85 and $9 paid on 10/23/85).

The Gilles were convinced that the address for the joint return had thus been established with the IRS as the address in Oklahoma. Obviously, the IRS knew where they now lived. After all the correspondence to and from the IRS at this address, what possible reason could there be for Gille to send them further notice of a change of address? However, the IRS recorded the change of address for Mrs. Gille only. Though it was she who happened to handle this set of correspondence, the IRS was never given notice — "clear and concise" or otherwise — that the Gilles were ever divorced or separated. Indeed they are still living together, as always. Surely the IRS was entitled to rely on the information provided by Petitioner that he was married, absent clear and concise notice to the contrary. Reliance on that information, and on the fact that mail addressed to Gille had been forwarded to this address, made it unmistakable that this was Gille's address.

2. Awareness of a move does not prevent the IRS from sending notice to the correct address.

In response to Gille's assertion that the holding in this case improperly permits the IRS to ignore clear evidence

that a taxpayer has moved, the Government urges, "The fact that the IRS is aware that a taxpayer has moved does not disable it from providing the notice required by the statute" (Opp. 8).

The Government seems to admit that the IRS must use reasonable diligence to ascertain a taxpayer's address (Opp. 6,9). However, the admission is rendered meaningless by the Government's insistence that the use of the word "known" in the term "last *known* address" excuses the IRS from concerning itself with anything but the address on the taxpayer's own most recent return, or an explicit notice of the new address which the taxpayer himself has provided (Opp. 8-9).

The Government insists that even if the IRS has perfect knowledge of the correct address, it is entitled to ignore that knowledge *unless* that knowledge came directly from the taxpayer in the proper form. However, the Government has not notified the citizens that they must formally notify the IRS of a change of address even when the IRS obviously already knows their new address. The Government insists that this deprivation of notice of deficiency, without notice of what they must do to prevent the deprivation, is due process. Wrong.

3. Notice may be sufficient though never received, but only if truly sent to the last known address.

The brief in opposition asserts that actual notice is not required and that a notice mailed to the last known address is sufficient even if it is never received (Opp. 7-9). The principal authority for this assertion, cited four times and quoted twice, is dicta. The court in *King v. Commissioner*, 857 F.2d 676 (9th Cir.1988), did not hold that a notice was

sufficient though not received. It held that the notice was not sent to the last known address, and was therefore invalid.

The other authority is not of general applicability. In *Guillen v. Barnes*, 819 F.2d 975 (10th Cir.1987), the court held that Darlene Guillen had given false information to the IRS, including a false social security number and two false addresses, and that *under the facts and circumstances*, her failure to receive the notice was her own fault and could not be held to be the fault of the IRS.

The IRS itself has successfully argued that, unless the taxpayer receives actual notice of the deficiency in time to petition Tax Court, a notice of deficiency mailed to the wrong address and returned to the IRS undelivered is null and void. *Holof v. Commissioner*, 872 F.2d 50 (3rd Cir. 1989).

4. The factual issue of diligence was determined in Petitioner's favor.

The opposition brief states that the issue of diligence, in determining the address for the notice of deficiency, is a factual question that does not warrant further review (Opp. 9). This implies that the petition seeks to question this diligence. However, the petition does not question the diligence, since the trier of fact determined that the IRS failed to exercise reasonable diligence (Pet.App. B.12).

5. When the IRS issued the notice of deficiency, it was already aware that the Gilles had moved, and had the new address in its computer.

The opposition brief argues forcefully that in determining the last known address for the notice of

deficiency, information acquired after the notice was sent is not relevant (Opp. 10). This argument overlooks the facts that 1) the IRS was aware of the move prior to issuing the notice of deficiency, and 2) the IRS had the new address in its computer long before it issued the notice.

The IRS claims as the last known address the address on the Gilles' joint return for 1982. In addition to all the correspondence to the new address in Oklahoma regarding this joint return for 1982, preliminary notices to the old Utah address had been returned to the IRS undeliverable, which also put the IRS on notice that the Gilles had moved from Utah (Pet.App. B.5). In the course of collecting a deficiency on the 1982 joint return, the IRS had recorded the Gilles' correct address in its computer in 1985, over two years before it issued the notice of deficiency (Argument 1 above). The entities for the first two disclosures were taken from a computer report which plainly showed the Gilles' then-current address (Pet.App. B.5,B.6). This report just as easily could have been generated prior to issuing the notice of deficiency.

6. Availability of post-payment suit for refund does not justify deprivation of pre-payment privilege.

The petition's third reason for granting the writ, involving denial of access to Tax Court, is dismissed by a mere comment in a final footnote in the opposition brief (Opp. 11 n.7). The government dismisses the reason as insignificant, arguing that there is an alternate remedy through a post-payment suit for refund. This argument is irrelevant 1) since it fails to address the due-process provision for a pre-payment remedy, and 2) since the proposed remedy is financially unavailable to Gille.

7. This Court may instruct the court of appeals to remand.

The opposition brief argues that Gille failed to contend in the court of appeals that the court of appeals should remand rather than reverse, and that this failure prevents him from contending for remand now (Opp. 12, n. 7). This argument overlooks the obvious fact that Gille could not have known that the court of appeals would reverse without remanding for determination of other issues plainly before the trial court.

8. A holding on the last known address for the notice of deficiency does not foreclose challenges regarding the last known address for other notices.

The same final footnote in the opposition brief asserts that the holding of the court of appeals regarding the last known address for the notice of deficiency settles the issue of last known address for all notices (Opp. 12). This new argument is specious, as it ignores the statutes (Pet. 24).

All authorities agree that "due process" means notice and opportunity to be heard. The statute states that a notice of deficiency sent to the last known address may be considered sufficient though never received, specifically when "such taxpayer is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence." § 6212(b)(1). The statute is ambiguous regarding any other situation (as recognized by at least one court that Petitioner has read but needs more time to locate).

One reason a notice of deficiency might be allowed even though not received is that no deprivation of property is authorized without further notices to the taxpayer, including a notice of assessment, and then a notice of intent

to levy. Due process clearly prevents deprivation of property when the IRS is aware that no actual notice has been given or received. *Crowd Management Services v. United States*, 792 F.Supp. 87 (D.Or. 1992) (assessment invalid if notice not received within 60 days); *Shapiro v. Secretary of State*, 499 F.2d 527, 531 n.12 (162 U.S.App.D.C. 391)(1975) *aff'd on other grounds*, 424 U.S. 614 (1976) ("The power to levy is inoperative until the subsequent 'failure or refusal' of the taxpayer to pay the required amount.").

9. The argument regarding other grounds considered by a lower court applies more to Gille than to the Government.

The opposition brief makes much of its claim that there were "additional arguments advanced by the government as independent grounds for reversing the decision of the district court" (Opp. 6 n. 3, 7, 11).

This argument is effectively an assertion that the holding of a lower court should not be disturbed without considering all of the issues that were before that lower court. Bingo. This is precisely why the court of appeals was in violation of the rules of appellate procedure, as claimed in the petition, when it reversed the holding of the district court without remanding for determination of the other issues raised in the lower court.

CONCLUSION

A writ of certiorari should issue to review the judgment and opinion of the Court of Appeals.

Respectfully submitted,

J. Charles F. Gille, *pro se*
1700 W. Quantico St.
Broken Arrow, Okla. 74011
(918) 455-5968

April 1995